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AND

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PREFACE

THIS, the sixth volume in the series, contains the printed versions of fourteen public lectures delivered in the Faculty of Laws at University College, London, during the Michaelmas and Spring Terms of the Session 1952–1953, together with the text of an address given by the Rt. Hon. Sir Raymond Evershed, the Master of the Rolls, at the Annual Dinner of the Bentham Club held in February, 1953.

It is our pleasant duty to thank Mr. E. H. Scamell for his work as Assistant Editor of this volume of *Current Legal Problems* in dealing with the proofs and compiling the Index and Tables of Cases, Statutes and Treaties.

Contributors, Publishers and Printers have again given every assistance towards achieving speedy publication and our thanks are due to all of them.

THE EDITORS

University College, London
April, 1953

I

THE INFLUENCE OF REMEDIES ON RIGHTS

The Rt. Hon. Sir Raymond Evershed

It may perhaps be thought that, after presiding for six years over the committee appointed by the former Lord Chancellor to inquire into the practice and procedure of the Supreme Court, I have managed to acquire an undue, if surprising, affection for matters of procedure: or, at any rate, that I have come to attach too much weight to them.

In truth, however, the law as a living thing, as a system that is being administered, cannot in any event be understood apart from procedure. Certainly from the point of view of the ordinary citizen it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of our legal system from his personal knowledge and experience in seeing the legal machine at work: in observing, whether as a party, as a witness, or even as an interested spectator (if you like, as an incarnation of Lord Justice Mackinnon's officious bystander) the way in which the facts are presented by examination and cross-examination, the way the points of law are argued, and, perhaps, most of all the way in which the whole case is handled and disposed of by the judge. Nor should we underestimate the significance of the layman's point of view. Though all the citizens are subject to the law, yet the true function of the law is to serve society, not to dominate it; to be an intelligible and respected part of our way of life, not to be a mystery in the hands of a privileged priesthood.

But there is another consideration more significant still. It cannot, I venture to think, be open to doubt that under our system of law (and, for this purpose, I include the system which generally persists throughout the English-speaking world) procedure has had in the past an effect upon substantive law which it would be difficult to exaggerate. Whether it continues so to do nowadays is the main point which I would like to discuss this evening.

I note, then, at once three most important changes (perhaps, in their effect, revolutionary changes) which have occurred in our legal system in recent times, and which may have entirely altered its emphasis. I shall return to them hereafter, but they must each of them singly and all of them in combination have had a profound effect upon our system, and in particular upon the relative importance within the system of remedies and rights. The first change occurred three quarters of a century ago with the passing of the Judicature Act, 1873, and the subsequent bringing into operation for the first time of a uniform code of procedure applicable in all the branches of the Supreme Court in lieu of the distinct procedures hitherto prevailing in the distinct courts which preceded the establishment of the Supreme Court of Judicature. The second change emerges from the increased tendency of late to codification by statute of many parts of our law. A rule of law not enshrined in any statute has within it at least some capacity of continued growth and development. But when a statute has been passed defining and replacing the old rule, the question is one not so much of discerning the true principle behind the rule but of construing the precise language of the statute. This statement is, I am aware, an over-simplification, for the old rule and the history of the old rule will, I apprehend, be a relevant consideration on a matter of construction of the statute. Still, as time passes and one codifying statute perhaps succeeds another, the rights and duties comprehended in the statute tend to acquire a certain static quality that the old law did not itself, or at least should not, have possessed prior to codification. My third change is of a somewhat similar character to the second, and is no less important. It is this. The emphasis not only in the law but in all ordinary affairs has shifted very much from property, and interests in and obligations in respect of property, to personal rights and personal duties. Not so long ago it seemed sometimes to me that it was hardly thought to be respectable at all to be, for example, a landowner. I think now we have moved away somewhat from that extreme view, which was no doubt in part due to two world wars. For, oddly enough—and this is perhaps a reflection of the character of England in the eighteenth and nineteenth centuries—in a time of war and crisis many people seem less to resent interference with personal liberties than interference with proprietary interests. But certainly, what with one thing and another, not forgetting taxation, the idea of property which has made so great an impression upon our legal thought in the past is less significant today than are personal rights and personal obligations, and many of these are subject in one form and another to statutory regulation. It may not in this connection be irrelevant to note that, according to figures which I have, of all the civil actions tried in the Queen's Bench Division in any year, something like 45 per cent are personal injuries actions of one kind or another. Part of this volume of litigation is no doubt a reflection of the benefits society has derived from the invention of the internal combustion engine; but other and a large part is due to the acceptance by society that in all forms of industrial employment obligations are owed to those who work in factories, etc., which the old law of negligence is not sufficient to safeguard.

To all these matters I shall return because, although the title of this address covers a very broad field, that part of its area which I particularly want to consider is the modern relationship of remedies to rights with particular attention to the effect of the old equitable remedy of the injunction on legal relations today. As regards the past, the conclusion is not, I imagine, in any real doubt: and I am conscious that if I spent much time on our legal history I should at best be doing inadequately and superficially what has already been fully and brilliantly done before. I have in mind the monumental work of Professor Holdsworth which has now advanced to its thirteenth volume; the classic lectures of Professor Maitland, and the no less erudite lectures of Mr. James Barr Ames of Harvard University. I am therefore content to make one or two quotations with a few reminders of the course of development of law and equity in England. I will start with a quotation from Holdsworth: 'In tracing the origins of substantive law we must as a rule look to the earlier history of the forms of action'.[1] And here are two citations from Maitland: 'The law of England has to a very large extent been the law administered by the king's courts, and to be without remedy in those courts has commonly been to be without any remedy at all'.[2] And of the time of Edward I he says: 'Men have learnt that a power to invent new remedies is a power to create new rights and duties'.[3] As regards equity, let Holdsworth speak again: 'Equity is no exception to the general rule that the adjective part of the law is developed before the substantive'.[4] And, finally, let me quote from the speech of Lord Parker of Waddington in that case, which will always be the particular joy of law students, *Sinclair* v. *Brougham*[5] (unless *Re Diplock*[6] has taken its place): 'Starting from a personal equity based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage, derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognised as such by the common law'.

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[1] Holdsworth, *History of English Law,* Vol. 5, p. 278.

[2] Maitland, *Equity* (1913), p. 304.

The last quotation may be said to contain the whole kernel of the matter for present purposes. In stating that equity acts to prevent what it regards as unconscionable conduct, Lord Parker is saying that equity acts *in personam*: and he also indicates what the consequences may be of granting over a period of time and in certain sets of circumstances a particular remedy. The question, then, arises, which has of late been much debated. Since the Judicature Act, 1873, and since in particular by s. 25 (11) the equitable remedies of specific performance and an injunction have been made universally applicable, are new equitable rights coming, or capable of coming, into existence? Was Mr. Justice Harman right the other day when he said that equity, though older than Sarah when the Lord appeared unto Abraham in the plains of Mamre, is also not to be presumed to be past the age of childbearing? Is there, or should there be, a new equity? I have arrived obviously upon the borders of controversy, and I shall be careful. As a judge I do not think it appropriate that on such an occasion as this I should take up any cudgels. I shall prefer to pose questions and leave their answers to others. In any case, in such an assembly as this, I am aware that I am likely to be worsted in any wager of law or ordeal by battle.

But I must first remind you—and I said that I should do so very shortly—of some matters of history. As regards the common law, I shall be short indeed. The old names trespass, trespass on the case, assumpsit, debt, detinue, trover, and all the rest of them, are household words in every lawyer's mouth. Whether they are used to signify causes of action or forms of action they are outstanding features of the landscape of the common law. In old days the question for the man who had suffered some injury was not, as Professor Winfield puts it, 'has the defendant broken some duty which he owed me' but rather 'Is there a form of action which fits my case and if so what is it?' No one will, I imagine, doubt the truth behind Professor Maitland's aphorism that although the forms of action are buried they continue to rule us from their graves. The case reported in last year's law reports of the claim for damages by a wife for loss of her husband's consortium provides a recent example of examination into the old forms of action.[7]

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[3] *Ibid.*, p. 345.
[4] Holdsworth, *op. cit.*, Vol. 9, p. 335.
[5] [1914] A.C. 398, at p. 442.
[6] [1948] Ch. 465.

Upon this aspect of our legal history I venture only to remind you of four points, all substantially affecting and enhancing the early influence of remedies on rights: (1) That these old forms of action and causes of action developed against the background of still older courts and older remedies, wager of law and ordeal by battle to which, for obvious reasons, they came to be preferred; (2) that there was a close connection between the forms of civil action (particularly as regards torts) and what we now call the criminal law, that is, the maintenance throughout the kingdom of the King's peace; (3) that there was real rivalry between the distinct common law courts, the Common Bench or Common Pleas, the King's Bench and the Exchequer, each somewhat avid of jurisdiction and not only on grounds of professional susceptibilities: for there were the Court fees for those concerned in the administration; and (4) that in the course of this same development arose the celebrated fictions, some designed to get over administrative or other deficiencies involved in a particular form of action, others arising out of the rivalry above mentioned and designed to give jurisdiction—for example, to the courts of King's Bench and Exchequer in cases between subject and subject. And however beneficial in their origin, there can be little doubt that the use of these fictions tended to give an artificiality to the procedure which, in turn had its limiting and sterilising effect upon the causes of action which the procedure should have been designed to serve. It may be argued indeed that these fictions, starting as servants, became in the end the masters. I shall refer here only to one, a fiction of the first of the classes I have mentioned. It is said that the complexities of the 'real' action were such that it was virtually impossible ever to bring one to a conclusion—the same has been said, though on different grounds, of a partnership action today. To get over this difficulty there entered upon the stage that celebrated, if spectral, character, Mr. John Doe. Thenceforth the tenant in fee, by suing in the name of his fictitious lessee or termor, John Doe, was able to litigate his rights more efficiently by way of ejectment, particularly if he also had a fictitious defendant of the name of Stiles. Now the interest of the matter for present purposes (as will later appear) is this. The common law has always said that a husband cannot sue his wife in tort but the common law judges, with what may be called a fine cynicism, held that no such disability attached to the husband's lessee, Mr. Doe.

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[7] *Best* v. *Samuel Fox* [1952] A.C. 716.

I have made these few references to the history of our common law also in order to make the point that in looking back at the history of equity it must not be forgotten what was the nature of the background against which, in turn, equity developed. Equity indeed (though no doubt at times the rivalry between its chief exponent and the chief exponent of the common law flared up into some violence—for example, in the time of James I) grew up side by side with, encouraged, if you will, by the self-imposed limitations of the common law, but therefore rather supplementary to than in conflict with it. After all, many of the notable Chancellors were common lawyers as were those who practised in the Chancellor's Court, and from the earliest days it was the Chancery which issued the common law writ and settled its form.

I have already cited Professor Holdsworth's authority for the view that equity was not exceptional in that its adjectival law preceded the substantive. I am aware that, like any other generalities in the law, this statement may not be universally accepted. Thus, in his twentieth lecture, Mr. Ames discusses the views of those like Justice Oliver Wendell Holmes who had claimed the proposition to be a heresy. At least, however, it is a valid argument. No doubt in earliest times equity proceeded upon what might be called a single and uniform principle—the principle stated by Lord Parker. 'Time,' says Mr. Ames, 'has strengthened the conviction of the present writer that the principle "equity acts upon the person" is and always has been the key to the mastery of equity'.[8] So it is that equity has regarded rather the conduct of the defendant than the character of the plaintiff's rights. We speak commonly of 'equitable *relief*'. In some cases there can, I imagine, be little doubt that the adjectival law, in the sense of the relief commonly granted, did precede, or at the least that it greatly influenced, the establishment of the rights in equity to which the party in whose favour the relief was granted came to be regarded as entitled. The law of trusts is one example; though had equity from the start attributed to the *cestui que* use or *cestui que* trust the proprietary interests which they have since become entitled to assert, it might have defeated the very object for which the use or trust was created. A more striking example may be the law of mortgages, and the establishment by equity of the principle that, notwithstanding the terms of the mortgage, the right of the mortgagee was limited to that of being a secured creditor. It seems to me more doubtful whether the equitable principle that, upon the execution of a contract for the sale of land, the property passes in equity to the purchaser, was a consequence of the availability of the equitable remedy of specific performance. For myself I am inclined to think, particularly when regard is had to the fact that equity granted specific performance to the vendor as well as the purchaser, that the principle I have mentioned, like the relief itself, both arose from an application of the more general principle that in the view of equity that should be treated as done which ought to be done. In passing, what a strange thing it is that, as a consequence of the application of the equitable remedy of specific performance, a man in our country may be liable to be sent to prison for failure to perform a civil contract; yet we have become so used to it, and so readily accept the justice of the principle, that I suppose it hardly ever occurs to any one that there is anything unusual about it. However that may be, it is, I suggest, a mistake to suppose that the Court of equity is or ever was (or indeed could be) a purely moral Court. No doubt, in a sense, it was a Court of conscience. Lord Hardwicke so called it in the eighteenth century, though Mr. Justice Buckley in the twentieth century denied it.[9] The truth is that if it was a Court of conscience, the conscience which guided the Court was not *naturalis et interna* but rather *civilis et politica.* The point is well illustrated by my distinguished predecessor, Lord Greene, in delivering the judgment of the Court in that enthralling case, *Re Diplock,*[10] where he says, after referring to the passage from Lord Parker which I have earlier quoted: 'This explanation appears to us to accord with the fundamental conception which lies at the root of this equitable jurisdiction, *i.e.* that equity intervenes, not to do what might be thought to be absolute justice to a claimant, but to prevent a defendant from acting in an unconscionable manner . . . if this limitation on the power of equity results in giving to a plaintiff less than what on some general idea of fairness he might be considered entitled to, that cannot be helped'. Whatever indeed might have underlain the earliest efforts of the Chancellors to do justice to him who petitioned the King as the fount of justice, the historical circumstances to which I have briefly alluded must early have placed a necessary limitation on the Chancellor's powers. Any other result must have led to a destruction of the prestige of the King's courts of law or to anarchy—or to both; for palm tree justice, however attractive it may sometimes appear to be, is in a civilised community inconsistent with any established legal system. As Professor Maitland observes: if the situation had been that the courts of law said 'This is A's property' and the courts of equity at the same time had asserted 'No. We say it is B's', that is anarchy, neither more nor less. And so, since equity was early to become a system of established doctrine in a civilised community, it had to have its limitations. Blackstone of course was concerned to say that its limitations and artificialities were hardly to be distinguished from those of the common law. But even Lord Hardwicke, to whom later generations have turned as the fount of a system of justice that has today become, according to the zealots, somewhat lost in bogs and sands, recognised the essential limitations of his jurisdiction. There was, you remember the sad case of the young man who borrowed a sum of money on the security of a legacy of £4,000 which he had every reason to expect from a kindly aunt. The old lady did not disappoint him though she disappointed the lender; for she contrived by her will to provide that the £4,000 was to be laid out in land, and the equitable doctrine of conversion made it accordingly unavailable for the creditor. 'It is a cruel case', said Lord Hardwicke; but he could do nothing.[11]

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[8] *Lectures on Legal History* (1913), p. 283.

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[9] *Re Telescriptor Syndicate* [1903] 2 Ch. 174, at p. 195.

[10] In the C.A. [1948] Ch. 465.

Thus it comes about that, however great the influence of equitable remedies on the formulation of equitable rights (and the nature of the remedies contained within their almost limitless capacity) nevertheless, in order that equity and law could develop side by side and together survive as coherent parts of our system (and not, I venture to think, merely as the result of the operation of our doctrine of precedent) the influence of the remedies was limited and equity developed along defined lines. In particular, it proceeded by analogy to the common law, *Aequitas sequitur legem*. The equitable interests under a trust by and large came to have the same characteristics as legal estates; and (more important for present purposes) these equitable estates cannot (in my view at any rate) be strictly called rights *in rem*. For, if they were, they would be good against all the world, and that we know is a characteristic they do not possess—they may be defeated by that well-known character in the law books the bona fide purchaser of the legal estate without notice. They may indeed be said rather to be quasi-contractual in character; which has led learned men to suggest that the whole system of trusts might never have formed part of our system of equity had the courts of common law been quicker to realise the possibilities of their action of assumpsit. Again, and still more important for my present purposes, both the courts of common law and the courts of equity from the earliest times applied the same principles in the construction of statutes.

Now this last point seems to me today to be of the utmost importance, particularly since, as I have already indicated, so much of our judicial time is necessarily spent (and in the future perhaps more still of it will be spent) in construing statutes.

I am brought, therefore, appropriately back to the first of my three changes—the passing of the Judicature Act, 1873. But

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[11] *Trelawney* v. *Booth*: see Holdsworth, *op. cit.*, Vol. 12, p. 270.

I would like at this point to interpose one suggestion and one reference. The suggestion is this: suppose that the courts of equity had never in regard to mortgages acted upon the principle that the mortgagee is but a secured creditor according to the substance of the transaction: and so had never evolved the equity of redemption and all the other attributes of mortgages which depend upon that principle; suppose, instead, that in the early years of the reign of Queen Victoria (I choose my date deliberately in good time before the passing of the Judicature Act) Parliament had decided to enact that, notwithstanding anything to the contrary in any mortgage deed, a mortgagor who in the meantime had duly paid all interest upon the money lent at the rate specified in the mortgage, and had otherwise observed the conditions of the deed, should at any time, on giving due notice and on repayment of the amount borrowed with interest to the date of redemption, be entitled to redeem the mortgage and call upon the mortgagee to reconvey the land to him; would the courts of equity—or the courts of law—have since evolved, as a matter of construction of the enactment, the theory of the mortgagor's equitable interest, what we now call his equity of redemption, or anything like it? Would the courts of equity, acting on the principle that he who seeks equity must do equity, have as a matter of interpretation worked out the ideas of tacking and consolidation? Would the courts of equity have pronounced that upon redemption there must be no clog or fetter on the interest of the mortgagor? I do not attempt any answer to these questions which, nevertheless (you may think), are not without interest or unworthy of some consideration. If, as I venture to suggest is at least possible, none of these things would have happened, my hypothesis at least emphasises how different, how much more restricted, will be the development of rights or interests (apart from those created by the enacted law itself) when the question for the Court is one of the construction of an Act of Parliament.

My reference is to certain published addresses which I have recently had the pleasure of reading of that most cultured and erudite American judge, Learned Hand.[12] In the course of his addresses he has much wisdom to impart on the oft-debated topic of the judicial function, and the true nature of judicial impartiality when it comes to the construction of Acts of Parliament or their equivalent. We must accept these enactments, according to our way of life, as the expression of the common will. As Judge Hand observes, it is not enough for the judge merely to act upon what he calls the dictionary principle—to see whether the question posed is in terms covered by the express language of the enacted law and, if not, to decline to go further. But, equally, he must be careful, if the question posed (as, after all, is so very often the case) is not in terms covered by the enactment, to avoid going further than he is sure, from his reading of the language used, the legislature would have gone had it been faced with the particular case before him: to avoid, in other words, concluding the matter in accordance with what he himself might think a just result should be: for in the latter case he would become, not as the judges are or should be, but like the judges of Israel, rulers of the people. And Judge Hand goes on to make the further and most interesting point that this method of judicial interpretation, this true emanation of judicial impartiality, is not only a desirable, but a necessary, corollary of our system whereby the common will is expressed, as it is, in general terms in the enacted law: but would by no means be equally desirable or necessary if there were substituted some other system of government, for example, by a series of gallup polls; for under such a system it would be by no means clear that impartial judicial interpretation of the meaning of the answers to the polls would be the best way of regulating our affairs.

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[12] *Spirit of Liberty* (1952).

I had arrived at the Judicature Act, 1873, in all conscience in many respects a revolutionary enactment. I am, however, concerned, and only concerned for present purposes, with paragraph 11 of s. 25. 'Where there is any conflict or variance between the rules of equity and the rules of common law . . . the rules of equity shall prevail in all courts . . .'. The section is often referred to as involving the fusion of law and equity. It was in truth a procedural provision only. Still, it had the far-reaching effect that the old equitable remedies of specific performance and injunction became generally available in all the Queen's courts. In my judgment, too much has sometimes been expected of this provision. I have said already that it was procedural only; but, more than that, as it seems to me, the enactment necessarily proceeded upon the view that the rules of equity were then a known body of established doctrine. According to Sir George Jessel the rules of equity were from time to time invented, and he went so far as to say that in many cases we know the names of the Chancellors who invented them. Sir George Jessel had very great knowledge. But, assuming the truth of his celebrated dictum, it seems to me that the passing of the Judicature Act, and s. 25 (11) in particular, put a stop to, or at least a very severe limitation on, the inventive faculties of future Chancery judges. It is one thing to say that if a conflict should occur between two sets of known rules one should prevail over the other. But it is a different thing to suggest that judges should invent new rules of equity for the purpose of superseding the old established rules of law. So it was, in my view, that the cases of *Britain* v. *Rossiter*[13] and *Joseph* v. *Lyons*,[14] not long after the passing of the Judicature Act, were decided by the Court of Appeal as they were. In the former, you will remember, the Court repudiated the notion that the equitable doctrine of part performance could now be invoked to get over the effect of the Statute of Frauds in the case of a contract of personal service which, because of the absence of writing, gave to the parties to it no claim at law at all. And in *Joseph* v. *Lyons* it had been sought to establish a present equitable title to after-acquired personalty. I do not know whether some people think that these two cases should have been decided otherwise than as they were —on the broad and simple ground that thereby abstract justice, what Lord Greene in the passage I have earlier quoted to you described as 'a general idea of fairness' would thereby be satisfied. I confess that to my mind such results would have gone far beyond anything which the Judicature Act contemplated or defined and would indeed have been incompatible with its express terms. We find, then, that an enactment of this kind tends to give a static quality to the law as it stood immediately before the Act was passed.

I come to the *Winter Garden Case—Winter Garden Theatre (London) Limited* v. *Millennium Productions Limited*[15]—a case of considerable significance for present purposes. If the effect of section 25 of the Judicature Act has disappointed some, and if an invocation of its provisions tends to be regarded like the summoning of that hardworked bird, the moorcock, as a desperate and forlorn hope, the *Winter Garden Case* has a real claim to be treated as an exception to the general rule. If I may venture a reminder, the point involved was whether a contractual licensee of a London theatre was entitled to an injunction to restrain the licensor from revoking his licence in breach of the alleged terms of the contract. In the result, the House of Lords found in the licensor's favour because they thought, on the true construction of the document, that there was no term of the contract express or implied which an immediate revocation would infringe. But, notwithstanding the actual decision, it is plain that the authority of the Court of Appeal, and of some, at any rate, of the noble lords, has now established a licensee's right to an injunction to prevent a licensor disturbing the licensee's use of the property, where such disturbance would involve a breach of contract. Viscount Simon observed in inference to the classic case of *Wood* v. *Leadbitter*[16]: 'It is enough to say that, at any rate since the fusion of law and equity, no Court in this country would refuse a plaintiff in Wood's situation the remedy for which he asked'. Lord Simon was also of the opinion that an affirmative answer should be given to the question which had been much discussed, whether *Hurst* v. *Picture Theatres*[17] was rightly decided: but in this respect he received no support from his colleagues. Lord Uthwatt reserved his opinion upon it; but in the course of his speech said that the settled practice of the Courts of equity is to do what they can by injunction to preserve the sanctity of a bargain. He said that he could discern no answer to the propositions formulated in the case under appeal by the then Master of the Rolls, Lord Greene. The relevant part of Lord Greene's judgment includes the following:—

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[13] (1879) 11 Q.B.D. 123 (C.A.).
[14] (1884) 15 Q.B.D. 280 (C.A.).
[15] [1948] A.C. 173.

'The next question which I must mention is this. The respondents have purported to determine the licence. If I have correctly construed the contract their doing so was a breach of contract. It may well be that in the old days that would only have given rise to a right to sue for damages. The licence would have stood revoked, but after the expiration of what was the appropriate period of grace the licensees would have been trespassers and could have been expelled, and their right would have been to sue for damages for breach of contract, as was said in *Kerrison* v. *Smith.* But the matter requires to be considered further, because the power of equity to grant an injunction to restrain a breach of contract is, of course, a power exercisable in any court. The general rule is that before equity will grant such an injunction there must be on the construction of the contract a negative clause express or implied. In the present case it seems to me that the grant of an option which, if I am right, is an irrevocable option, must imply a negative undertaking by the licensor not to revoke it. That being so, in my opinion such a contract could be enforced in equity by an injunction'.

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[16] (1845) 13 M. & W. 838.
[17] [1915] 1 K.B. 1.

Observe that where the circumstances justify the grant of an injunction—to restrain the breach or threatened breach of a negative stipulation, express or necessarily implied—the effect, including the penal consequence, is practically the same as a decree for specific performance.

The importance, then of the *Winter Garden Case* is, first, its authority for the licensee's right to an injunction which (so it is said) has at least the practical effect of giving to the licensee, the terms of whose contract entitle him to claim relief, a right to obtain specific performance and therefore a kind of equitable interest in the sense of a proprietary interest in the land as distinct from a mere right to have a particular remedy for a breach or threatened breach of contract. Second, and as a consequence, the case will be found somewhere prominently in the genealogical tree of the more recent and more striking development or innovation in this field, namely, the right or interest of the deserted wife to remain in occupation of the matrimonial home. Again, I am on the banks of the waters of controversy. I have said already that I propose to be circumspect. I have, upon this matter of the interest of the licensee, had the advantage of reading the article of Professor Cheshire in the *Modern Law Review.*[18] I confine myself here to two observations. First, there is, after all, nothing new or revolutionary in the grant of the equitable remedy of injunction to prevent a breach or threatened breach of contract, where the terms of the contract expressly or by implication imply a negative covenant. *Lumley*

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[18] *A New Equitable Interest in Land* (1953), 16 *Modern Law Review,* p. 1.

v. *Wagner*[19] had been decided one hundred years before. It does not seem to me necessarily to follow that any distinct 'equity', any proprietary 'interest', emerges because the contract in suit is related in some way to the use or occupation of land. The essence of the matter is the preservation of the sanctity of the bargain for which the equitable remedy is available, as it is now available (equity having in the old days kept somewhat clear of tort because of its affinity to crime) likewise to prevent a continuance or commission of some tortious act, *e.g.*, nuisance. Has, then, the man who has paid his money for a ticket to the racecourse or for a seat in the cinema any more or less an equity or an equitable interest than the man who obtains an injunction (say) against his neighbour to prevent the latter making excessive noises or keeping more than fifteen cats in his flat?

Second, Professor Cheshire has shown cogent reasons why the necessary incidents of the licensee's 'equitable interest' should not involve difficulty or hardship to the licensor or landowner. But has sufficient attention been paid to the real character and limitations of this so-called 'equitable interest' in the hands of the licensee? A contractual licence, like any other contract, may be assignable. Equally, it may not be. The right conferred may be personal to the particular licensee. None the less, that person will, I apprehend, be entitled in case of any threatened breach of his bargain to go to the Court for equitable relief. Yet the first thing to note about the quality of his 'equitable interest' in that event is that it is something of which he cannot effectively dispose, whether by will, gift, assignment, or otherwise. In this respect the licensee appears to possess an 'interest' of somewhat similar characteristics to that modern phenomenon, the statutory tenancy. Whatever may be said of the nature of the right of the statutory tenant, it cannot fairly be called an interest in the sense of having in the eye of the lawyer any observable proprietary quality.

I can now pass to my second and third changes—the modern tendency to codification and to more enacted law and the general growth in the significance of personal rights and duties and their increasing regulation by statute—which for this purpose, may be taken together. I have already indicated first that where the right or obligation is defined by statute, the question of the appropriate remedy is necessarily ancillary and can have, save perhaps by way of analogy, little formative effect on the right itself; and second, that the courts of law and equity have always applied the same principles in the construction of statutes. I earlier suggested for your consideration a hypothesis, *i.e.,* that of the mortgagor's equity of redemption having been created and defined by statute, and I have thought the suggestion worthy of some reflection because (apart from wartime measures) so many of our relations one to another are now regulated in some degree by statute today. The question which now frequently arises (and it is a striking modern aspect of our law to which perhaps too little study has been so far given) is a question of construction of the statute, whether the regulating enactment, in addition to any liability for penalties in case of breach, has also conferred rights in a civil action at the suit of the particular person who should be damaged by the breach. And that is a question of construction of the Act—whether upon a true interpretation of its terms it should be taken as intended to be for the particular benefit of a particular class of persons. The Factory Acts are a classic example where an affirmative answer is given to the question.

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[19] (1852) 1 D.M.G. 604.

On the other side is a case like *Cutler* v. *Wandsworth Stadium Limited,*[20] where the House of Lords held that the Betting and Lotteries Act, 1934, gave to a bookmaker no civil action against the occupier of a dog racing track for failing to provide him with space for his business. (You will have noticed the limitations of that decision in Mr. Justice Parker's case reported in last Saturday's *Times.*[21]) My brother Morris, as the judge of first instance, considered in *Clarke* v. *Brims,*[22] whether failure to comply with the obligation imposed by the Road Traffic Acts to have a rear light on your vehicle at night gave rise to a civil claim by someone who alleged that he had suffered damage as the result of another having left his unlighted car on a main road at night; and he decided in the same sense as the bookmaker's case. Examples easily multiply. I draw your attention to the language of Lord Herschell as long ago as 1894 in *Institute of Patent Agents* v. *Lockwood,*[23] where the House was considering

[20] [1949] A.C. 398.
[21] February 21, 1953.
[22] [1947] K.B. 497.
[23] [1894] A.C. 347, at p. 361.

a similar point under the Patents etc. Acts of 1883 and 1888. The Lord Chancellor observed that Parliament having imposed a penalty of £20 for the offence of practising as a patent agent without being on the register, it would appear a strange thing if, in addition, an unregistered agent was liable to be sent to prison for failure to comply with an injunction granted at the suit of the Institute and certain registered patent agents in a civil action. I will mention the Town Planning Acts and similar legislation controlling the right of local authorities and others to acquire compulsorily, or put restrictions on the use of, land belonging to private persons—only to show that I do not forget them. Again, the right conferred by Parliament is specified in the enactment, and it is difficult to see much scope in the area of human relations subject to all this enacted law for the emergence of new rights out of remedies, or even for much scope for influence on the part of remedies. Then there are the Rent Acts, and I come again to that very special animal, the statutory tenant. What eighteenth century, or even nineteenth century, lawyers would have thought of him I do not know—he has already been called *monstrum horrendum informe ingens*. It has been held that he can maintain an action for trespass, but Lord Justice Scrutton (to whom so much is due for elucidation on this subject) has made it equally plain that he takes no interest which is transmissible by any means—his right is a personal right of continued occupation conferred by statute. Having such a right I do not doubt that the equitable remedy of injunction would be available at the suit of the statutory tenant against another who wrongfully sought or threatened to disturb his occupation. The equitable remedy would be available no less to protect the statutory right than to protect the sanctity of a bargain. But that fact cannot of itself convert or enlarge the nature or quality of the right.

I come again—I cannot avoid it—to the latest and most striking character on the legal stage: the right of the deserted wife to continued occupation of the matrimonial home. The Rent Acts and the housing shortage will be found, like the *Winter Garden Case,* in its genealogical tree. And I must say that it has come rather like the recent floods, a bit unexpectedly and with a rush. Certainly it had not a very promising start. Whether at common law a husband had the right to bundle his wife, like his furniture, into the street seems open to some doubt. In *Hutchinson* v. *Hutchinson* in 1947[24] it was said he had not, but in *Bendall* v. *McWhirter* in 1952[25] you find the contrary is stated. I have earlier observed that at common law the husband could not sue his wife in tort, but section 17 of the Married Woman's Property Act, 1882, may be said to have removed that obstacle. So far as the matrimonial Court was concerned, the wife's remedy, as I understand it, was by way of a petition for restitution of conjugal rights until power was given to the courts following Mr. Weldon's unhappy case in 1883[26] to order maintenance by way of periodic payments. Who would have imagined, then, after *Brown* v. *Draper* in 1944[27] (where Lord Greene seems to have thought that the husband could give up possession against his wife) and the neglected case of *Taylor* v. *McHale* in 1948,[28] that so great a change could have come about by the end of 1952? I do not seek in any way to resile from anything that I may myself have contributed to the final result, but I am bound to say I am somewhat uneasy about its implications. This is not the time or the place to discuss them —for they go outside the bounds of this address; nor have I the capacity to improve upon Mr. Megarry's analysis in *The Law Quarterly Review*.[29] I was glad, by the way, to see added to the literature upon the subject a characteristically interesting article by Professor Glanville Williams in the December, 1952 number of *The Canadian Bar Review* with the title 'Interests and Clogs'[30]; and I can see the force of the argument that you do not necessarily save yourself from the consequences of all these decisions by speaking of clogs rather than interests. Still, clogs they are at the moment, by authority; and a clog in favour of A upon the interest of B does not seem to me necessarily to involve an interest having a proprietary quality in A. The lawyer's mind is directed to the case of mortgages. The equitable rule against clogging the equity of redemption (*pace* Lord Parker, who attributed it to the usury laws), seems the necessary corollary of the proposition that the right of the mortgagee is that of a secured creditor for the money lent and no more. Since the courts of equity evolved the mortgagor's 'interest', known as the equity of redemption, it may no doubt be said that his right to be free from clogs and fetters is, as it were, one of the recognisable incidents or characteristics of his interest. But in the converse case of the wife's right to continued occupation of the matrimonial home—and I do not forget that *Bendall* v. *McWhirter* was not a Rent Act case at all—it does not seem to me to follow that the existence of such a clog or fetter necessarily has the effect of conferring an equitable interest having any proprietary quality upon the wife. What, after all, is its extent and nature apart from the fact that it would appear (at present) to be determinable upon adultery without reasonable cause? Like the right of the statutory tenant and the licensee, it is in no sense transmissible, and although, as I have already acknowledged, the right is by no means limited to the case of the wife of a statutory tenant, still, in such a case, it would seem strange that the wife of such a tenant should have an equitable proprietary interest when the statutory tenant himself has not, and is incapable even of passing on what he has got to any one else.

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[24] [1947] 2 All E.R. 792.

[25] [1952] 2 Q.B. 466.

[26] *Weldon* v. *Weldon* 9 P.D. 52.

[27] [1944] K.B. 309.

[28] [1948] *Estates Gazette Digest*, p. 299 (C.A.).

[29] *The Deserted Wife's Right to occupy the Matrimonial Home*, 68 *Law Quarterly Review* (1952), p. 379.

[30] *Canadian Bar Review* (1952), p. 1004.

But these considerations go only to show that some further consideration of this knotty problem may be the desirable, if unenviable, task of the House of Lords. What is more germane to the subject of the present address is that, apart from the influence by analogy of the *Winter Garden Case,* the creation or formulation of the right of the deserted wife does not really seem to me to owe much, if anything, to the influence of remedies. In other words, if a new equity has been created, it has arisen (subject to the one qualification by reference to the *Winter Garden Case*) from judicial interpretation of a statute. And in that respect the right may claim a certain pioneering virtue.

I have, I am afraid, travelled somewhat superficially and discursively over a very large area, and it is proper that I should now in a sentence or two state my conclusions. They are these.

First, there have come upon the legal scene changes which, to say the least, have greatly disturbed the old historic course of development in our legal system, particularly as regards the relations of rights and remedies, and the capacity henceforth of remedies to create or influence the character of rights. *Second,* there has concurrently been a change in the judicial function, or at least in its emphasis. More and more the judges must direct their attention to the interpretation of enacted law steering their difficult course between the two extremes indicated by Judge Learned Hand. Let me add that in this respect England is not exceptional. Mr. Justice Frankfurter noticed[31] that whereas in 1875 nearly half the controversies that came before the Supreme Court of the United States were 'common law litigation', in 1947, of the vastly increased number of cases before that Court, substantially all turned upon or essentially involved questions of the construction of enacted law. Let it not, however, be supposed that this aspect of the judges' work is less useful or necessarily less creative. In the difficult field of rent restriction where human ingenuity would vex the attempted codification of the most skilled parliamentary draftsman, the judges have at least succeeded in giving an elastic coherence to the much (and, as I think, sometimes unjustly) abused legislation. But *third,* it remains nonetheless necessary to understand the history and principles of the common law and of equity for they constitute the underlying philosophy of our legal system. Novel human relations in a complex society are likely to give ample scope for the application of ancient principles to new circumstances. Moreover, in addition to any influence which these principles and our ancient remedies may have by analogy upon the interpretation and enforcement of our enacted law, let us not forget our debt to those skilled members of our profession, the mute but by no means inglorious draftsmen of our Acts of Parliament, who by drawing upon their knowledge of the whole body of our law and assuming a like knowledge on the part of those who have the task of administration blend the new with the old, endow the new enactments with language having 'echoes in the corridors of time', and thereby wholly or in large measure strip the most striking legislative innovation of its particular political significance. Those charged with suggesting reforms in our law must surely, if their task is to be well performed, know and understand not only what the existing law is but why it is. And last, and perhaps by way of postscript, I make a plea to all my colleagues whose lot it may be from time to time to try to divine and apply any of those principles of law or equity which centuries of thought and effort have evolved not, by rash and unnecessary attempts at exhaustive definition, to fetter the later application of the principles and to write *finis* prematurely to a chapter in our story. For as Dr. Goodhart has observed, if in a sense we are slaves of the past, we are liable to be despots of the future.

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[31] Benjamin N. Cardozo lecture before N.Y. Bar Association, March 18, 1947.

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THE CONSTITUTIONAL CRISIS IN SOUTH AFRICA

G. W. Keeton

No one who knows South Africa, and who has been impressed by the vastness of its as yet undeveloped resources can fail to be dismayed by the situation which now exists in this Commonwealth nation. With its two branches of the Western European group of peoples, closely akin, more sharply divided than they have been since the conclusion of the last Boer War, and with two non-European communities now in open opposition to the Government of the moment, the future seems dark, and it is tempting to press comparisons between South Africa to-day and the United States of the years immediately preceding the Civil war. Here once again the status of the negroes has proved the rock upon which the nation has split, but here again, as in the United States ninety years ago, behind the immediate problem of the status of the negro stands the even more fundamental issue of the status of the constitution itself. Is the constitution a binding and unchangeable compact, or is it a statement of contemporary political realities only, to be altered at will by the Government of the day? Such issues are not of transcendent importance in a unified State such as the United Kingdom is. They assume a special urgency in States such as South Africa and Canada where two or more peoples claim equal rights of self-expression and development within the framework of a plural State.

In South Africa, as in Ireland, politics is often a commentary upon history, and not always upon recent history. Although the number of Boer settlers who were on commando during the last Boer War, between 1899 and 1902, is shrinking rapidly, the memory of their exploits is still a living tradition in the Union, and in recent years it has steadily acquired a sharper tone. As always, when earlier traditions are somewhat artificially fostered, there are strange paradoxes. Thus, Johannesburg, whose restless industrialism proved the magnet for the Uitlanders in the 'eighties and 'nineties of last century, is to-day one of the world's great commercial centres, and it emphatically rejects the nationalism of the party now in power. Even more surprisingly, so does Pretoria, which was Oom Paul's capital, but which is to-day a handsome and rapidly-expanding city of well over 100,000 inhabitants. If Johannesburg is international, Pretoria is unmistakably Africaner—yet its adherence is to the United Party, which numbers many eminent descendants of the old Boer settlers amongst its members. On the other hand, the Nationalists are by no means all of Boer stock. For reasons not too difficult to discover, they include many of the original German settlers in South West Africa, and in addition, in some of the small Dutch farming communities, there are descendants (mainly of the first generation) of settlers from these islands, who are Africaans-speaking, and who are as Nationalist in outlook, especially upon the treatment of the negro and coloured peoples as their Boer brethren.

The roots of the present conflict are buried very deep in the political history of South Africa. In two masterly chapters in Volume 2 of his *Civitas Dei,*[1] Mr. Lionel Curtis, himself one of the architects of the present South African constitution, has traced the nineteenth century struggle between Boer and Briton, intensified by conflicting outlooks on native policy. When the importation of slaves from tropical Africa to the Cape was ended by an imperial Act of 1807, forbidding the transport of slaves to British colonies, the Boer settlers for the first time sought to make use of Hottentot labour, and they were instrumental in passing repressive laws regulating the relations of white employer and negro servant. These were resisted by Protestant missionaries, sent from England, mainly by the London Missionary Society, who regarded the existence of slavery and the imposition of onerous contracts of service upon free negroes as a challenge to be faced. The efforts of the missionaries played a considerable part in the organisation of opinion in England leading to the abolition of slavery by Act of Parliament in 1833. Needless to say these developments aroused keen resentment amongst the Boer farmers, and were directly responsible for their steadily-developing determination to live beyond the limit of British rule in South Africa. Their efforts to do so in turn provoked the successive wars with Bantus and Zulus into which the Imperial Government was drawn with increasing reluctance. Eventually in 1881, Mr. Gladstone's Government decided to renounce all claims to sovereignty over the Boer settlers in the Transvaal, and this decision was carried into effect, notwithstanding the humiliating defeat of a small British force by the Boers at Majuba in February, 1881. Thereafter, until the Peace of Vereeniging in 1902, the Transvaal was independent, with the title of 'The South African Republic', under President Kruger.

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[1] Chapters 43 and 52.

Even so, this settlement of 1881 was in reality no settlement, for in 1885, gold was discovered in the Transvaal, and Johannesburg was founded. Into it poured an alien community, amongst whom the British were foremost, in pursuit of wealth. In a few years, the aliens outnumbered the Boer settlers, and the character of the Republic appeared to be about to suffer a decisive change. Once more Boer tenacity produced a crisis, for the Boers introduced repressive legislation, denying civil rights to the Uitlanders. Indeed, at this period, conditions in the Transvaal showed a striking similarity to those in Texas in the period immediately preceding its annexation by the United States. Not even Boer tenacity could withstand industrial and commercial penetration, and after the tragi-comedy of the Jameson Raid in 1896, relations between the South African Republic and Great Britain steadily deteriorated, until open warfare broke out in 1899. The result, as might have been anticipated, was that the Boers were overwhelmed, and the Transvaal was reannexed, but only after the Boers had performed prodigies of endurance and heroism. Nevertheless, throughout this sharp division between Britain and Boer, ran a strangely-unifying thread. The protagonists on both sides, whether it was Paul Kruger or Cecil Rhodes, realised that Africa south of the Zambesi was destined to become a single political unit. Both realised also that such a unit must be responsible for its own future development. Rhodes, however, believed that this future could only be achieved under the British flag, as a new Dominion comparable with Canada and Australia. Kruger, on the other hand, represented that intractable Boer burgher spirit which would admit no compromise with the ideal expressed in the short-lived South African Republic. That spirit to-day finds expression in the Nationalist Party.

On both sides, however, as the war drew to a close, a new spirit of co-operation was born. On the Boer side, the younger leaders, Botha, Smuts and Hertzog, loyally accepted the terms of the peace treaty, and very quickly Botha and Smuts found themselves working in close co-operation with Jameson. On this solid foundation, the Union of South Africa was built, and to the development of that Union the three Boer statesmen henceforth devoted the whole of their public life. In the First World War it was a united South Africa which placed itself among the Commonwealth nations in opposition to Germany.

1. THE UNION OF SOUTH AFRICA ACT, 1909

The Union established by the Act of 1909 was, as its preamble states, the result of prolonged discussions, followed by resolutions, in the Parliaments of the four colonies, the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony. It was therefore in the nature of a constitutional compact, embodied in an Act of the Imperial Parliament. As Mr. Curtis points out, because it was felt to be essential for the future development of South Africa to have a common policy on such matters as the native question, customs and railways, and because in the years following the South African War, the measure of agreement between Boer and Briton appeared to be so wide, the Act set up, not a federal but a unitary State, in which the Union Parliament could override the provincial councils. Thus Article 19 of the Act of Union says:

'The legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of a King, a Senate, and a House of Assembly'.

Until the Statute of Westminster in 1931, the Union Parliament legislated subject to the limitations existing in respect of any Dominion Parliament. When South Africa adopted the Statute of Westminster the overriding checks previously existing disappeared, and the Parliament of the Union became a sovereign legislature with powers closely resembling those of the Parliament of the United Kingdom. Indeed, if one remembers that the Parliament of the United Kingdom is the successor to the separate Parliaments of England, Scotland, and Ireland, the parallel appears close. There exists, however, one important distinction. South Africa possesses a written constitution. That constitution provides for its amendment in the following terms:

'152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the numbers of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses.. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament'.

The effect of such a clause is that the sovereign Parliament of the Union has an unlimited power to amend the constitution of the Union, but that if it wishes to amend or repeal sections 33, 34, 35 or 137 it must do so by making use of the special procedure set out in section 152.

The section out of which the present constitutional crisis has arisen is section 35, which reads as follows:

'35—(1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly but no such law shall disqualify any person in the province of the Cape of Good Hope, who, under the laws existing in the colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

'(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour'.

It is evident that this section represents a compromise on an old controversy. The Cape of Good Hope was ceded to Britain by Holland in 1815, and thenceforth Great Britain in South Africa pursued a policy which she was putting into force elsewhere. The importation of negro slaves was stopped, and the slaves themselves were freed in 1833. The Cape 'coloured' are to a large extent the descendants of these freed slaves who, since emancipation, have made an important contribution to the development of the Cape province. The section was a guarantee that their rights, which were of long standing in consequence of Crown Colony rule, should not be abridged as a result of Union. As an element in the compact between Boer and Briton, it had therefore a special importance and a special sanctity—exactly as much, in fact, as section 137, which guarantees the equality of the two languages.

Something must now be said of the constitutional status of the Union of South Africa. When the Union Act came into force in 1910 the Union enjoyed Dominion status and was subject to the provisions of the Colonial Laws Validity Act, 1865, and to the Crown's power of disallowance of Union legislation, exactly as the other Dominions were. In consequence of the Statute of Westminster in 1931, however, these restrictions were swept away, and since South Africa is a unitary, and not a federal State, it followed that it emerged as a sovereign State with an omnicompetent legislature. That is to say, there were no limitations on its competence to legislate on any topic whatever. This was recognised at the time when the Statute of Westminster came into force, for in 1933 the Union Government introduced into the Union Parliament a Bill providing for the repeal of section 65 of the South Africa Act, 1909, which provided for the exercise of the power of disallowance by the Crown in respect of Union legislation. Since this might have impaired the security of South African trustee stocks there were discussions between the British and South African Governments, as a result of which, although the South African Act was duly passed, it was accompanied by the Colonial Stock Act, 1900 Declaration Bill, by virtue of which the South African Government undertook not to pass any Act affecting the status of trustee stocks in South Africa until agreement with the British Government had first been reached.

These discussions are very illuminating. They fully recognised the unlimited competence of the South African Parliament to legislate, but on one particular topic the South African Government has bound itself not to change the existing law until a specified procedure has been followed.

There are marked resemblances between the problem resolved in this way in 1934, and that which overshadows South African public life to-day. The Union of South Africa Act, 1909, gave to the Union Parliament, in section 152, power to amend the constitution, but it provided a special procedure for repeals in respect of sections 33, 34, 35 and 137, the procedure being that both Houses of Parliament should sit together, and at the third reading, there should be in favour of the Bill a majority of not less than two-thirds of the total number of members sitting together. This was the position before the Statute of Westminster in 1931. That Act merely added the factor that after the date when it came into operation the Union Parliament should be a sovereign Parliament with an unlimited legislative competence. It is exactly at this point that the argument with regard to sovereignty becomes somewhat confused. The Union Government obviously thought that since, in consequence of the Statute of Westminster, pre-existing limitations on the legislative competence of the Union Parliament had been removed, that circumstance allowed the Parliament of the day to ignore any special legislative procedure prescribed by the Union Act. In pursuance of this line of thought, apologists for Dr. Malan's Government and for the course of action they have adopted, have referred to the unfettered sovereignty of the United Kingdom Parliament; and to the well-known characteristic that no English Parliament can bind its successors. The argument is a little more potent than is sometimes supposed in this country, for the Acts of Union with Scotland and Ireland in each case designated sections of the Acts, relating to the status of religion and of the Established Churches in Ireland and Scotland, which were declared to be incapable of repeal or modification. Nevertheless, both Acts of Union were modified on these topics by later Acts of the Parliament at Westminster. Dicey, in commenting upon the fate of such provisions,[2] concludes that ' the history of legislation in respect of these very Acts affords the strongest proof of

[2] *Law of the Constitution* (9th ed.), p. 65.

the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body'.

Professor Wade, who advised the South African Government in *Harris* v. *Donges,* in his long *Introduction* to the ninth edition of Dicey, considers the very South African decision, *Ndlwana* v. *Hofmeyr, N.O.*[3] on which the present South African Government founded its argument in *Harris* v. *Donges.*[4] He concisely summarises the effect of that decision as follows[5]:

'In *Ndlwana* v. *Hofmeyr, N.O.,* the Supreme Court of the Union of South Africa decided that with the repeal of the Colonial Laws Validity Act the Parliament of the Union had become a sovereign legislature of the same kind as the Parliament of the United Kingdom. The Court declined to question the validity of an Act of the Union Parliament on the ground that its enactment was *ultra vires* the Union of South Africa Act, 1909. This Act of the United Kingdom Parliament, enacting the Union constitution, contains what are known as "entrenched" clauses. By section 152 it is provided that certain sections, including section 35 which relates to qualifications for voters, shall not be repealed or amended except by a joint sitting of both Houses of the Union Parliament and by a two-thirds majority of the total number of members of both Houses approving the third reading. The Native Franchise Bill, 1936, was not so approved, but the appellant argued that it was a law which fell within this entrenched section and therefore was not validly enacted by the procedure prescribed for the entrenched clauses.

'The Court refused to regard the procedure of section 152 as binding and held that the legislature could pass any measures by joint or separate sessions at their option. Provided that the Bill received the royal assent, it was binding on the Courts, who would accept a King's Printer's copy as conclusive evidence. By section 2 of the Status of the Union Act, 1934, the Parliament of the Union had been declared to be the sovereign legislative power in and over the Union, and only bound by enactments of the Parliament of the United Kingdom passed *subsequent* to the Statute of Westminster if they were extended to the Union by

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[3] (1937) A.D. 229.

[4] (1952) A.D.

[5] Page 51.

Act of the Union Parliament. But section 2 did not refer to pre-Statute of Westminster enactments extending to South Africa, nor has the Union of South Africa Act been re-enacted by the Union Parliament'.

This last point is an interesting one, although so far no spokesman for the Union Government has contended that the Union constitution is no longer binding in South Africa, and it may be added that section 1 of the High Court of Parliament Act, 1952, impliedly treats it as still operative within the Union. Even so, however, Nationalist spokesmen have recently put forward the view that the Union Parliament should now re-enact the Act of Union with whatever modifications seem desirable.

A view very different from that of Professor Wade was advanced by the Hon. F. A. W. Lucas, Q.C., a former judge of the Witwatersrand Division of the High Court, in an article in *The Rand Daily Mail* on April 21, 1952. He there put forward the view that *Ndlwana* v. *Hofmeyr* had not decided that the entrenched clauses had been made inoperative as a result of the adoption of the Statute of Westminster by South Africa. All that the judgment had done was to decide that the Courts could not inquire into the validity of what purported to be an Act of the Union Parliament promulgated in due form. He contended that the entrenched clauses had never been in issue in the case. In 1936 the Union Parliament had acted in accordance with the provisions of the entrenched clauses, and had passed the Native Franchise Act in joint sitting with a two-thirds majority. Ndlwana contended that the entire Act should be invalidated because Parliament had sat in joint session—a procedure which had not been prescribed by the Union Act of 1909. This argument did not prevail, for the Supreme Court had decided that Parliament could adopt any procedure it wished, except where expressly restrained by the constitution. Difficulty had arisen from the Court's decision in 1937 because more was said in the course of its judgment than was necessary for the decision. The Court had said in effect, but in reality *obiter,* that if the members of the House of Assembly and the Senate ignored the entrenched clauses, and what purported to be an Act of Parliament was published, however wrong the action of the Government or members of the legislature might be, the Courts would not inquire into the validity of such an Act. But, concluded

Mr. Lucas, the Court did not consider what, under the South Africa Act, is the appropriate body with power to amend the entrenched clauses. That body was the two Houses of Parliament sitting together. Properly examined, therefore, *Ndlwana* v. *Hofmeyr* was not an authority at variance with the more recent decision.

Before considering the arguments advanced in the more recent case, it will be useful to refer to two decisions of the Privy Council, dealing with the constitution of New South Wales, which have some bearing on the question. In *Att.-Gen. for New South Wales* v. *Trethowan*,[6] the dispute turned upon the application of section 5 of the Colonial Laws Validity Act, 1865, to the colony. That section provides that every representative legislature shall have full power to make laws respecting the constitution 'provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament or Colonies Law for the time being in force in the said colony'. In 1929 the New South Wales Constitution was amended, and one section (7A) of the amending Act, provided that a Bill abolishing the Legislative Council should not be presented for the Governor's assent until it had been submitted to a referendum. In 1930 the New South Wales Government presented for the Governor's assent two Bills, the first repealing section 7A of the Act of 1929, and the second abolishing the Legislative Council. Neither was submitted to a referendum. The Judicial Committee of the Privy Council held that section 7A of the Act of 1929 was still in force, and a referendum was necessary. Lord Sankey, L.C., in delivering the opinion of the Judicial Committee, pointed out that section 5 of the Colonial Laws Validity Act, 1865, governed the question, and he continues:

'It will be observed that the second sentence of the section contains an enacting part with a proviso, and it was vehemently contended by the appellants that the affect of the proviso was not to cut down the operative part of the sentence, and that any construction of the words "manner and form", which are contained in the proviso, which cut down the powers previously granted, was repugnant to the power so granted. In their

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[6] [1932] A.C. 526.

Lordships' opinion it is impossible to read the action as if it were contained in watertight compartments. It must be read as a whole, and read as a whole the effect of the proviso is to qualify the words which immediately precede it. The powers are granted *sub modo*. Reading the section as a whole, it gives to the legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the Statute Book'.

Lord Sankey also pointed out that a Bill to repeal section 7A of the Act of 1929 must also be passed in the form prescribed by the Act of 1929.

Has this decision any relevance for the South African controversy? Admittedly the Union Parliament is a sovereign legislature whilst the Parliament of New South Wales is not. Admittedly the Colonial Laws Validity Act governed the New South Wales controversy, but had no application to South Africa. But if the Union Constitution Act of 1909 is operative in the Union, then the argument of Lord Sankey suggests the manner of its application to the current dispute; unless it is argued that the fact of the sovereignty of the Union Parliament has swept away the necessity for any compliance with prescribed forms.

In *Doyle* v. *Att.-Gen. for New South Wales,*[7] the appellant sought the decision that certain further amendments to the New South Wales constitution were invalid on the ground (*inter alia*) that they violated certain fundamental principles, with which the Legislature was bound to conform. The Judicial Committee of the Privy Council rejected this argument, and with it, the suggestion that a legislature, though legally competent to legislate, could be fettered in the exercise of this function by some extra-legal fetter upon its competence. If this case has any application to the South African dispute its effect is that the solution of the South African dispute must be found within the terms of the relevant statutes. Appeal to understandings and compacts which may have preceded the passing of the Union Act in 1909 is valueless.

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[7] [1934] A.C. 511.

2. HARRIS V. DONGES

It is now time to consider the decision of the South African Supreme Court in *Harris* v. *Donges*,[8] and the events which have followed it. The South African Government had initiated, and the Union Parliament had passed a further Act, the Separate Representation of Voters Act, 1951,[9] which prescribed that coloured voters should be placed on a separate register. This Act, which admittedly adversely affects the rights of coloured voters, had not been passed in accordance with the procedure prescribed in Article 35 of the Union Act, 1909. In *Harris* v. *Donges* the question was whether the Act so passed was binding. The Cape Provincial Division held itself bound by the decision of the Appellate Division in *Ndlwana* v. *Hofmeyr*.[10] On appeal, however, the Appellate Division held that it was not bound by its own previous decision, especially as the constitutional question had only been briefly argued in the earlier case. There is nothing unusual in such a decision, since the American Supreme Court and the Judicial Committee of the Privy Council have in the past adopted a similar view. In his judgment in the Appellate Division, Centlivres, C.J., was at pains to refute the stock Nationalist argument that if sections 152 and 35 of the Union Act were still in force, it was evident that the Union was not a sovereign nation. After referring to Canada and the United States, he said: 'It would be surprising to a constitutional lawyer to be told that that great and powerful country, the United States of America, is not a sovereign, independent country simply because its Congress cannot pass any legislation which it pleases', and he continued: 'A State can be unquestionably sovereign although it has not a legislature which is completely sovereign. In the Union legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under section 63 and the proviso under section 152 of the South Africa Act. . . . It is the South Africa Act and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function'.

The first part of this argument (which is developed in the first note in *The Law Quarterly Review* for July, 1952) is not really directly relevant. The question whether South Africa is a sovereign nation cannot to-day puzzle legal or political theorists, and it has been finally disposed of by Professor Cowan in his recent article in *The Modern Law Review*.[11] The Nationalist cries on this point are electioneering devices and not sober arguments. Questions which are more difficult to answer are:

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[8] [1952] 1 T.L.R. 1245.
[9] Act No. 46 of 1951.
[10] [1937] A.C. 229.

(1) Is the Union Parliament a sovereign legislature?
(2) If it is, does the form of legislature prescribed in section 152 govern the validity of its legislation in the fields prescribed by the section?

These questions are not easy to answer. Since the Statute of Westminster the Union Parliament has habitually proclaimed itself a sovereign legislature, although Professor Wade was a little doubtful whether such declarations, embodied in South African statutes, were entirely conclusive. At this date, however, Austin's test of *habitual* obedience to a sovereign body would seem to be satisfied.

The second question is more difficult. It has been pointed out that the status of the Act of 1909 itself in the Union is not free from ambiguity, although in view of frequent tacit acceptance of it in South African Statutes since 1931, it would probably be sound to say that there has been adequate acceptance of it subsequent to the Status of the Union Act, 1934. If this be conceded, then the concluding words of the note in *The Law Quarterly Review* for July, 1952, merit consideration:

'The 1909 Act must be regarded either as binding as a whole or as not binding at all. If one clause can be disregarded by the Government in power because it is restrictive in nature then all other clauses can be disregarded whenever it becomes politically convenient to do so. It is, of course, conceivable that those who have the political power in South Africa at this present time will disregard the decision of the Appellate Division, but this will mean that part of the constitution has been deliberately destroyed'.

As the learned writer of the note points out earlier, it is essential to examine these issues free from emotional attitudes, and if for the concluding words 'deliberately destroyed' there is substituted the phrase 'to that extent modified' the sense may be little altered, but the emphasis has decisively changed. No doubt there were Irishmen who thought that the Irish Church Disestablishment Bill of 1869, modifying the constitutional compact of 1800 'deliberately destroyed' an important part of the Act of Union. Nevertheless, our Parliament, in its wisdom and sovereignty, passed the Bill, and ignored the Act of 1800. It is an interesting speculation whether the position would have been in any way altered if the Act of 1800, instead of making certain provisions irrepealable, had provided that they should not be modified or repealed except after a joint session of the Commons and the Lords and a two-thirds majority of members. Mr. Gladstone on parliamentary sovereignty might have been a welcome, if lengthy, addition to the pronouncements of constitutional lawyers. Professor Cowan, in his learned article to which reference has already been made, rejects *in toto* the argument advanced on behalf of the Government of South Africa before the Appellate Division, and which in turn is founded upon Professor Wade's treatment of legislative sovereignty in his *Introduction* to Dicey. That argument was that English precedents show that a sovereign legislature's powers are *legally* illimitable. This is undoubtedly the position in England. Professor Cowan regards the position in South Africa as different because South Africa started off with a written constitution. If, however, the South African Parliament passed an Act which it declared to be irrepealable, would the South African Courts regard this provision as binding, or would they treat it in the way in which similar provisions have been treated in England?[12]

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[11] *Legislature and Judiciary*, 14 *Modern Law Review* (July, 1952), pp. 292–296.

3. THE HIGH COURT OF PARLIAMENT ACT, 1952

The solution of this juristic conundrum, it will be seen, is highly complex, and it seems likely that academic lawyers will long be divided upon it. The later stages of this struggle have seen both sides, and the Supreme Court, maintaining their positions with extreme tenacity, and beyond the point where compromise is possible. The Government, checked by the decision of the Appellate Division, replied by an ingenious manoeuvre. It passed in the usual way, a High Court of Parliament Act,[13] which created a High Court of Parliament to review any judgment or order of the Appellate Division of the Supreme Court of South Africa invalidating any provision of any Act of Parliament. Under the Act, the High Court of Parliament comprises every senator and every member of the House of Assembly, and the Court continues to function, notwithstanding a dissolution of Parliament, until the new Parliament assembles. There is a quorum of fifty. Applications for review are referred by the President of the Court to a Judicial Committee of ten members, four of whom form a quorum.

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[12] Although not by the Courts, since no one has thought it worth while to challenge Parliament's legislative omnipotence.

To this tribunal the decision of the Appellate Division in *Harris* v. *Donges* was duly referred. The proceedings lacked the element of tension that had characterised them elsewhere, since both the United Party and Labour members of the House had announced that they would take no part in the proceedings. The Nationalists on their part observed with satisfaction that with the passage of the Bill, effective steps had been taken to ensure that the will of the elected representatives of the people would prevail over the judiciary in all constitutional questions. Not unnaturally, and particularly in the absence of the United Party and Labour members, the High Court of Parliament decided that the Appellate Division was wrong, and that the Separate Representation of Voters Act, 1951, was valid. To this there could be only one reply.

The High Court of Parliament Act itself was tested before the High Court, and both the Cape Provincial Division and a unanimous decision of five judges of the Appellate Division held the Act invalid. Chief Justice Centlivres founded his judgment on the proposition that the Act would render nugatory the entrenched clauses in the constitution, and the Act was therefore passed in contravention of section 152. Mr. Justice Greenberg endorsed this view and added that a Court which was comprised of legislators who had themselves passed the Act failed to satisfy the requirements of an impartial tribunal. Mr. Justice van den Heever, who also accepted the main hypothesis of the Chief Justice, stated that the Court would not be doing its duty if it allowed the patent intention of the constituent assembly to be defeated, and finally, Mr. Justice Hoexter said that the Act authorised Parliament to do unicamerally by a bare majority what section 152 of the South Africa Act said it might do unicamerally only by a two-thirds majority.

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[13] No. 35 of 1952.

Faced with these very clearly-expressed judicial opinions, Dr. Malan's Government accepted the decision, and adjourned the dispute to the issue of a General Election. Should this give it a two-thirds majority, then it can be assumed that legislation will be quickly introduced to modify the entrenched clauses in a manner not capable of being challenged in the Courts. If, however, the desired majority is not secured, but Dr. Malan's Government remain in power, the issue will remain, to trouble South African law and politics further.

The real issue behind the present crisis, however, is not an abstract metaphysical question, soluble in the realms of jurisprudence, but a major cleavage of policy. The most disastrous feature of South African life at the present moment is the fact that all the traditional nineteenth-century feuds are now in full operation once more. Whether the Union Act of 1909 can be modified or repealed by a simple majority vote in each House of the Union Parliament is of comparatively slight importance, compared with the fact that the party in power has chosen to ignore or repudiate the political compromise on which the Union was built. To-day it revives the traditional native policy of the old Boer republics by the policy of *Apartheid*. In the broader field of national development it has slowed down immigration from English-speaking countries and has encouraged the entry of Netherlanders, Flamands and Germans. Even so, however, an editorial in *Die Huisgenoot* on August 15, 1952, pointed out that whereas in 1945–1946 50 per cent of the Netherlanders who wanted to emigrate wished to come to the Union, the figure had now dropped to 11 per cent. The remainder wished to go to Canada, Australia and New Zealand. In actuality only a few Netherlanders settled in South Africa last year. These figures are eloquent testimony of the anxiety now felt, not only in the United Kingdom, but elsewhere in Western Europe, upon the durability and future prospects of the Union. From this point of view, the decision in *Harris* v. *Donges* and its aftermath is a symptom and not a cause of existing tension, which inevitably imposes upon the Government the necessity of using increasingly dictatorial powers to suppress increasing disturbances. The main lesson of the crisis is that a constitution is only as strong as those whose association it regulates wish it to be. If the will to work it according to the spirit of the association is lacking, the decisions of courts cannot paper over the cracks which threaten the structure.

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FEDERATION IN CENTRAL AFRICA

NORMAN BENTWICH

THE way of Federation is a hard way. It is paved with good intentions and good drafts of Constitutions. But rough boulders are brought down by the floods of racial, national or religious passions, and break up the pavement. So the schemes for the federation of Europe, Federal Union of the United Kingdom and the United States, and a Federal India, have all come to grief. The one successful example of an African federation in recent years has been the union of Eritrea with Ethiopia, which was inaugurated in September, 1952. That Constitution was devised by a Committee of the United Nations with a view to securing the autonomy of the inhabitants of Eritrea and a close political and economic association with Ethiopia. It gives to the Eritrean Government legislative, executive and judicial powers in the field of domestic affairs, and to the Federal Government jurisdiction in defence, foreign affairs, currency, inter-State commerce, and external and inter-State communications. An Imperial Federal Council, composed of equal numbers of Ethiopian and Eritrean representatives, advises on the common affairs of the Federation, and the Legislative Chamber of the Federation is elected by the populations of the two countries in a fair ratio.

COLONIAL FEDERATIONS

A federal and a quasi-federal system have been introduced, since the World War, in two of what are called Multiple Dependencies of the British Commonwealth, *i.e.,* a union of territories with different legal status. The Federation of Malaya, which was constituted in 1948 to take the place of the abortive Malayan Union introduced two years earlier, is a combination of two British colonies or settlements—Penang and Malacca—with nine Malay States under British protection. Before the World War, four of these States, with each of which the British Government had a Treaty of protection, were federated, and five were not federated. At the end of the war an important step was taken towards closer union by appointing for the eleven territories in the Malay Peninsula a High Commissioner with executive powers in all matters of common concern. The powers were delegated by the Crown and the Rulers of the Malay States. He exercises them through a secretariat, and he is assisted by a Federal Executive Council comprising three *ex officio* members, four other officials and between five and seven unofficial members, all appointed by him. He consults with the Council, but is not bound by its advice. A Federal Legislative Council has a large unofficial element, but all the members, official or unofficial, are to-day appointed by the High Commissioner who is President of the Council. It is composed of seventy-six members, three *ex officio,* eleven other officials, eleven State and Settlement members, nine being Presidents of the State (*i.e.,* Territorial) Councils, and two representatives of the Settlement or Colonial Council, and fifty unofficial members. The latter are chosen on a functional non-racial basis; but in fact a fair balance is secured of the different communities, Malay, Chinese, Indian and European. The Constitution includes a statement of the intention to introduce elections for a Federal Council as soon as circumstances permit. The Council has legislative power in 144 subjects, which are set out in a Schedule. The aim has been to secure a strong central authority in all matters of economic and social policy.[1]

The quasi-federal Constitution is in force in a regional area of three East African territories, the Colony of Kenya, the Protectorate of Uganda, and the Trust Territory of Tanganyika. It was constituted for war purposes, with a view to the efficient working of common services such as railways and posts, and the co-ordination of economic policy. A standing conference of the Governors of the three territories, with a permanent secretariat, was instituted during the war. That has become an East Africa High Commission, composed of the three Governors, the Governor of Kenya being standing Chairman. In 1946 a Central Assembly was established with legislative powers in matters of common concern, for an experimental period of four years, and has been maintained. It is composed of twenty-three members, seven *ex officio,* five from each of the three territories, and one representative of the Arabs. All the members of the Assembly are appointed by the High Commission itself. A Schedule of the services administered by the Commission and of the specific subjects within the legislative competence of the Central Assembly has been drawn up. Mr. Wight, in his book on *Colonial Constitutions* describes the experiment as 'a super-multiple dependency on a federal basis'.[2]

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[1] See M. Wight, *British Colonial Constitutions* (1952), pp. 73–75.

PROPOSED CENTRAL AFRICAN FEDERATION

The latest plan for federation is to unite three territories in Central Africa, which are at present under different forms of British administration; the self-governing colony of Southern Rhodesia, which has attained a large measure of dominion status: the protectorate of Northern Rhodesia, and the protectorate of Nyasaland. Proposals for the closer union of the three territories have been put forward over a long period; and in 1938 a Royal Commission, under the Chairmanship of Lord Bledisloe, examined the question. It came to the conclusion that the three territories would become more and more closely interdependent in all their activities, but recommended that there should not be immediate amalgamation. The reasons were: (1) the native policies of the two northern territories (Northern Rhodesia and Nyasaland) and of Southern Rhodesia were in an experimental stage, and it was premature to say which of these policies was more likely to promote the material and moral well-being of the African inhabitants; (2) there was general opposition to amalgamation among Africans in the northern territories; (3) the European populations were not ready, either in numbers or in experience, to discharge the responsibility of administering a combined territory for the differing constitutional status of the three territories; (4) the differing degree of economic development of the territories.[3]

The experience of the World War, in Central Africa as in East Africa and in West Africa, stressed the need for economic co-operation between territories that formed a region. At the end of the war, in 1945, a Central African Council was established, with the object of promoting the closest contact and co-ordination of policy and action between the three territories in all matters of common interest. The Council consisted of the Governor of Southern Rhodesia as Chairman, and four members from each of the three territories, those from Southern Rhodesia being Ministers, and those from the other territories including unofficial members of the Executive and Legislative Councils. It was, however, purely consultative, and had no machinery for keeping in touch with public opinion, so that its recommendations lacked any popular backing.[4] The demand for closer union grew amongst the white population, both in Southern and in Northern Rhodesia.

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[2] *Op. cit.*, pp. 84–87.
[3] Cmd. 5949.

Following private conferences in Africa in 1950, the Secretaries of State for the Colonies and for Commonwealth Relations convened in London in March, 1951, a Conference of Officials of the three territories and of the Central African Council and of Commonwealth and Colonial officers. It was emphasised that the work of the Conference would be exploratory, and would in no way commit the participating governments to the adoption of any proposals. Full account would be taken of the special responsibilities of the British Government in the United Kingdom towards Northern Rhodesia and Nyasaland, and there would be consultation with African opinion in those countries.[5]

CONSTITUTIONS OF THE RHODESIAS AND NYASALAND

In order to understand the complexities it is necessary to survey briefly the history of the three territories whose federation is proposed. Southern Rhodesia and Northern Rhodesia were originally administered by the British South African Company, which received a Royal Charter in 1889. Cecil Rhodes was the dynamic spirit in the Company, and the white settlement of the countries that were inhabited by the Mashona and Matabele tribes was part of his plan for the extension of British rule over South and Central Africa. After the First World War there were proposals that Southern Rhodesia, which had a growing white population, should join the Union of South Africa. But a plebiscite of the settlers pronounced against the union, and the majority chose to be a British colony enjoying self-government.

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[4] Cmd. 8233, para. 15.

[5] *Loc. cit.*, paras. 1–3.

The country was annexed, and the British colonial administration was initiated in 1923.

In the following year the administration of Northern Rhodesia was transferred by the Company to the Crown, and a protectorate of the African population was established. The British Government had a trust for the well-being of the Africans. Nyasaland had been under a British protectorate since 1891. It was the influence of British missionaries and a few British traders in the latter part of the nineteenth century which brought about the request of the native chieftains for British protection.

After Malta, in 1921, Southern Rhodesia was the second colony to receive Responsible Government. It is not an independent Dominion—to use that almost obsolete term—because it does not enjoy external sovereignty. But in internal matters it is sovereign. The powers reserved by Letters Patent of the Crown for control over native affairs are inoperative in practice, and the formal right of the Crown to disallow legislation by the unicameral elected Parliament of the colony is also inoperative.

Northern Rhodesia received a Constitution in 1945, granting semi-representative Government. In 1948 that Constitution was amended, and a Legislative Council was set up with a non-official majority, including ten elected European members. Those elected members, however, are in a minority, the other members of the Council being nine officials, two Africans selected by a Central African Representative Council for appointment by the Governor, and two nominated unofficials to represent African interests, and a Speaker who is an unofficial person nominated either by the Governor or the Crown. In this plural society of white settlement, the official members and the non-official representatives of African interests outnumber the elected Europeans. The composition of the legislature is to be changed by increasing the unofficial majority.

AFRICAN POPULATION

The population of the three territories is predominantly African. In 1938, when the Royal Commission examined the possibilities of closer union, there were about 4,500,000 Africans and 67,000 Europeans. In 1950, when fresh proposals for closer union were put forward, the total population was estimated at 6,350,000 of whom 2,350,000 were in Nyasaland, 2,100,000 in Southern Rhodesia and 1,900,000 in Northern Rhodesia. The total number of Europeans was 169,000, of whom Southern Rhodesia had 129,000, Northern Rhodesia 36,000 and Nyasaland 4,000.

It is pertinent to the question of federation that the position of the African peoples in regard to land tenure has been laid down by legislation in the three territories. In Southern Rhodesia, by the Constitution, Letters Patent of 1923 and the Land Apportionment Act, 1941, 48,000,000 acres were reserved for Europeans and 37,000,000 for Africans. A similar assurance of the interest of Africans in relation to land is given for Northern Rhodesia and Nyasaland by Orders in Council. It is also pertinent that from the outset the leaders of the African peoples in Northern Rhodesia and Nyasaland have expressed grave misgivings and apprehension about proposals for federation or other form of closer union, and the initiative for federation has throughout come from a section, but only a section, of the white settlers.

OFFICIAL CONFERENCE, 1951

The Conference of Officials which was held in March, 1951, formed the conclusion that in the general interests of the Commonwealth and the particular interests of all inhabitants of the three territories, there is a compelling case for establishing an effective form of closer association, and that the need is urgent.[6] The economic considerations were the strongest. The economies of the three territories are so interdependent that closer association in the field of economic planning is essential to remove the present causes of friction and to secure the maximum economic development of the area as a whole in the interests of the people. Certain public services, posts, telegraphs and railways, would secure greater efficiency by unification. They urged that the material and social development of the Africans would march with the economic development of their countries, and that political as well as economic partnership between Africans and Europeans was the aim to pursue. It was by closer association that the policy of racial co-operation and partnership could best be promoted, and the fear of influences 'from outside the borders of British Central Africa' could best be averted.

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[6] *Loc. cit.*, para. 34.

The Conference was unanimous also in rejecting two other solutions: (1) amalgamation in a unitary State, having a single government and bicameral legislature, and (2) a league, to which the three territories would hand over certain functions and powers, to be exercised by it on their behalf. It recommended a federal system by which the federal authority would exercise full control over a wide field of specified matters that transcend territorial boundaries, or that concern external relations. The Federation should not impair the African interests assured by existing British legislation; and to this end Africans should not only be represented in the Central Parliament, but there should be a Permanent Minister for African Interests and an African Affairs Board to keep a watch on anything which might involve discrimination against Africans.[7]

Following the publication of the Report of the Official Conference—a kind of Dumbarton Oaks programme—the Secretaries of State for Commonwealth Relations and for the Colonies convened and attended a Conference of representatives of the three territories at Victoria Falls—in Northern Rhodesia—in September, 1951, to consider the scheme for federation. Southern Rhodesia sent the Prime Minister and other Ministers and leaders of the Opposition parties, Northern Rhodesia was represented by the Governor and official and unofficial members of the Legislative Council, including Africans; Nyasaland by the Governor, officials and leading unofficial persons, including Africans. The question most thoroughly examined was how to provide adequate safeguards for African interests. African opinion in the northern territories was opposed to the official proposals, but the representatives of African interests in Northern Rhodesia declared that Africans would be willing to consider the question of federation if, *and after,* a policy of partnership in Northern Rhodesia had been defined and put into progressive operation.[8]

AFRICAN FEARS

The African stipulation was not implemented. The Africans of the two Protectorates, and indeed of all three territories, are most deeply concerned about measures of economic discrimination and colour bars which still remain. They are fearful that, unless these are removed before a federal scheme is adopted, they will be subject to White domination and be prevented from advancing to genuine partnership. The political power in the Draft Federal Scheme is vested in the White majority of the Federal Assembly, and the representation of Africans, including the European members of the Assembly who will be chosen to vindicate African interests, as they see it, will be impotent. They fear that in accepting Federation they may be tying a noose around their necks.

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[7] *Loc. cit.,* paras. 38–40.
[8] Cmd. 8411, Annex.

It is pertinent in this connection that the policy for Africans in Southern Rhodesia on the one hand, and in the two northern territories on the other, is marked by important differences, to the disadvantage of the Africans in Southern Rhodesia. Annex II to the Report of the Official Conference remarks that there is much in common between the policies pursued in the three territories, and that the ultimate aim in each is to advance the African to the stage where he is in all respects a full partner, exercising all the rights and accepting all the responsibilities of citizenship. All the territories are developing Local Government institutions such as courts, authorities and treasuries, and all are following the same policies in education, health and agricultural development. At the same time, the British Government, through the Colonial Secretary, has special responsibilities under treaty and otherwise for the protection and advancement of the African peoples in the protectorates, while in the self-governing colony full power is vested in the Legislative Assembly, and limited only by provisions relating to Reserve Powers. In Southern Rhodesia the Land Apportionment Act declares separate European and African areas, while in the northern territories the law does not recognise geographical separation, though in practice it exists. In the latter territories the aim has been to fit the African to take his place in the Central Government, and to play a direct part in the politics and administration of the whole territory, whereas in Southern Rhodesia the principle accepted is that, before he can take his place in the community as a full partner, he must advance in health, material well-being and education.[9] Although, then, Europeans and Africans share a common Voters' Roll, only a very small fraction of the Africans can exercise the vote. The proposal in the Draft Constitution to give Africans separate representation is criticised oddly by the white settlers as racial discrimination.

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[9] Cmd. 8233, Annex 2.

In the northern territories African Trade Unions are legally recognised; in Southern Rhodesia they cannot be registered, and Works Committees and Labour Boards have been established to which Africans, individually or by association, can put their case. In both the Rhodesias wage agreements made between European trade unions and employers' organisations have in practice created an industrial colour bar in certain spheres of employment, by laying down European wage standards, and in the southern territory these agreements may receive statutory recognition. In the northern territories no legal or administrative restrictions are placed on the employment of Africans in any post in the government service for which they are eligible. On the other hand, in Southern Rhodesia the Public Services Act debars Africans from appointment to many posts. It is not surprising, then, that the Africans are apprehensive of a federation, in the Legislature and Executive of which Southern Rhodesians will be predominant.

RESUMED CONFERENCE, 1952

The Labour Government went out of office shortly after the Conference of September, 1951. The Conservative Government in the United Kingdom, which replaced it in November, lost no time in issuing a statement of its attitude, by which it adopted the recommendations of the Conference, and announced that the resumed conference should take place about July, 1952; and in the meantime there were to be discussions with the bodies of peoples concerned in Central Africa, and a draft constitution was to be prepared.

In fact, the Conference was reconvened in London in April, 1952, under the joint chairmanship of the Conservative Secretaries of State for Commonwealth Relations and the Colonies. The delegation of Southern Rhodesia included two African delegates, but although delegates of the African Representative Council of Nyasaland came to London and had informal talks at the Colonial Office before the Conference opened, they were unwilling to attend the Conference as delegates, fearing that that would imply acceptance of the idea of federation. They first asked whether they might attend as observers, but when the Secretary of State agreed to that suggestion they withdrew it, and thereafter took no part in the Conference.[10] The African members of Southern Rhodesia did take an active part, but when the draft federal scheme was published they expressed grave objection. Such African opposition has not halted the British Government.

The Scheme was published in June, 1952, and subsequently in the House of Commons it was severely criticised by members of the Labour and Liberal Parties. In October, 1952, three Reports were published of Commissions that had been appointed to work out details of the federal scheme for (1) fiscal matters, (2) judicial matters, (3) a Federal Civil Service Commission.[11]

LONDON CONFERENCE, 1953

A further Conference of the Governments of the United Kingdom and the three territories met in London in January, 1953, and reached final agreement. No African delegates, however, attended. A revised Federal Scheme, and the Report of the Conference were published as White Papers in February.[12] A new decision was that Salisbury should be the capital of the Federation. It has been announced that the Government of Southern Rhodesia will submit the question of federation to a plebiscite in the colony of all persons on the electoral roll, which includes only 4,000 Africans; and the scheme will be submitted to the legislatures of the two northern territories. Opposition to the plan has been organised, both in Southern and Northern Rhodesia, by a group of white settlers; and the Africans have made clear their solid opposition. A delegation of Nyasaland Chiefs came to London during the Conference to petition against federation.

CHARACTER OF FEDERAL SCHEME

The particular characteristic of the Scheme is that it proposes the federation between countries and peoples of different stages of development, and of unequal political and economic rights. It is an attempt to establish a form of political and economic partnership between peoples of a plural society, and between territories that have reached different stages of self-government. It contemplates legislative, executive and judicial bodies with large powers over a wide region and forming a strong central authority. But the special trusts of the British Government for the protection of the majority African population would be preserved. Southern Rhodesia would continue to enjoy self-government, while Northern Rhodesia and Nyasaland would enjoy the protection of the British Government and the separate governments would be responsible for legal and territorial political advancement, so long as the African people so desire. The establishment of a Federation would mean a curtailment of the present powers of the Southern Rhodesian Parliament, which is entirely elected; many of its functions would be transferred to a Federal Legislature and Federal Executive. The Federation must also affect the exercise of the powers of the British Government to protect the Africans. It is a question whether a trustee is entitled to impose a Federation against the will of the people who are the objects of the trust. It is unlikely that the Trusteeship Council of the United Nations would approve, or that its predecessor, the Permanent Mandates Commission of the League, would have approved, of such action by a trustee or mandatory power. The decision ultimately rests with the British Government, who will have to provide by Order in Council the promulgation of the Constitution.

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[10] Cmd. 8573, para. 11.
[11] Cmd. 8671, paras. 2 and 3.
[12] Cmd. 8753 and 8754.

THE LEGISLATIVE POWER

We must examine the draft Scheme in the revised form which was published following the London Conference in January, 1953.[13] The Federal Legislature consists of the Governor-General appointed by the Crown, and a Federal Assembly. It will be a single Chamber, composed of a Speaker and thirty-five members. Of those, twenty-six will be elected: fourteen by Southern Rhodesia, eight by Northern Rhodesia and four by Nyasaland. In addition, there will be six elected African members, two from each territory, and three European members charged with responsibilities for African interests. Of those three, one will be elected in Southern Rhodesia, and one each will be appointed from the other territories.

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[13] Cmd. 8753 and 8754.

The Assembly will choose its own Speaker and Deputy Speaker. The Deputy Speaker must be one of the thirty-five members, but the Speaker may be chosen from outside the Assembly. The division of functions between the Federal and Territorial Legislature is as in the Federal Malaya Constitution and the East Africa High Commission. Laws on certain matters are exclusively reserved for the Central Federal Legislature, and laws on other matters are set out in a Concurrent List, and may be passed either by the Federal or the Territorial Legislature. At the same time, power is given to both Federal and Territorial Legislatures to delegate to the other legislative body authority to legislate with respect to any matter which is in the exclusive list or outside normal federal competence, as the case may be, provided the matter is ancillary to or closely related to a subject for which the territorial or federal legislature is primarily competent. That is a complicated provision, which it would be for the Federal Court to interpret in case of dispute.

The matters which are in the Exclusive List of the Federal Legislature include external affairs, including implementation of treaties, extradition, defence, immigration and aliens, citizenship, import and export control, customs and excise, currency and coinage, banks (other than land banks), companies and corporations, patents, trade marks and designs, railways and ancillary services and inter-territorial roads, posts and telecommunications and broadcasting, supply of electricity, primary and secondary education of persons other than Africans (that is, Europeans), and higher education for all persons; and the establishment of federal courts, other than the Federal Supreme Court.

In the revised Federal Scheme, European agriculture in Southern Rhodesia, including animal health and plant pests, has been added to the Exclusive List of the Federal Legislature, and provision is made for the legislatures of Northern Rhodesia and Nyasaland transferring European agriculture and the attached subjects to the list of concurrent matters.[14] Another matter which was added to the Exclusive List by the last London Conference is the establishment, maintenance and administration of the federal police force for service in the employment of any territory, in addition to, or in substitution for, the police forces of that territory. That addition clearly contemplates making police a federal matter.

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[14] Cmd. 8754, pp. 11 and 14.

The matters which are on the Concurrent List, and may be the subject of legislation either by the Federal or the Territorial Chamber, include deportation, naturalisation, migration between territories, land banks, internal roads and regulation of road traffic, electricity, prisons, health and town planning. With the exception of health and higher education, matters which intimately concern Africans are to be left to the territorial legislatures. To assure protection of the African rights to land against possible encroachment by the Federal Legislature, any acquisition of land for federal purposes is subject to the provisions of the Orders in Council of the Protectorates and the Letters Patent of Southern Rhodesia.[15] In the revised scheme, however, the Federal Government may ask permission from the Secretary of State for the acquisition of African lands for public purposes which would be in the general interests of the community as a whole; and it is stated in a note that, unless African interests would be adversely affected to a disproportionate extent, the Secretary of State would not normally refuse permission.[16]

ELECTORAL SYSTEM

It will be for the Federal Assembly itself to pass an Electoral Law which must obtain a two-thirds majority of all members of the Assembly, and be reserved for the approval of the British Government. For the first election the rules for the existing Legislative Assembly in Southern Rhodesia and the Legislative Council in Northern Rhodesia will be applied with necessary adaptation, but no person may be a member of both the Federal and Territorial Legislature. In Nyasaland, where there is no elected Legislative Council, the election to the Federal Assembly will be governed by regulations made by the Governor-General, with the agreement of the Governor of the Protectorate. Separate provision is made for electing the African members and elected member for African interests, of whom three are allotted to Southern Rhodesia, and two each to Northern Rhodesia and Nyasaland. The African candidate must be a citizen of Southern Rhodesia, or a British subject or British Protected Person in the other territories—this aims to exclude foreign residents or infiltrees. The system of election is to be laid down in Southern Rhodesia by the Governor. The members from Northern Rhodesia and from Nyasaland will be elected by such body as the Governor may designate as a body representative of Africans. The Federal Supreme Court will determine any question as to the right of a person to be or remain an elected member for African interests. The two specially appointed European members, one for Northern Rhodesia and the other for Nyasaland, are to be appointed by the Governors. The same qualifications and disqualifications apply as to elected members, and the same jurisdiction as to their right to be or remain appointed is conferred on the Federal Court. The Speaker may be an elected member of the Assembly or chosen from outside; and if an elected person is chosen, he will vacate his seat.

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[15] *Loc. cit.*, Chap. 2, p. 7.
[16] *Loc. cit.*, p. 7.

GOVERNOR-GENERAL'S RESERVE POWERS

No financial measure may be submitted to the Assembly except with the recommendation or assent of the Governor-General, and any Bill passed by the Assembly may be vetoed by the Governor-General or reserved for signification of the pleasure of the British Government. In particular the Governor-General is required to reserve any Bill which makes any change in the Constitution, or is repugnant to any provision of the Constitution, and any Bill, the provisions of which appear inconsistent with the obligations of the Crown in an international agreement, or a Bill containing provisions to which the assent of the Crown has been refused. Her Majesty, moreover, may disallow a Federal Law twelve months after it has been assented to by the Federal Government.[17]

AFRICAN AFFAIRS BOARD

One of the crucial questions in the Federation has been the composition of the body which is designed to safeguard the rights of the Africans, and to prevent any discrimination against Africans in the law or regulations or administration. The Conference of Officials in March, 1951, as noted above, proposed the establishment of a Minister for African Interests, as well as an African Affairs Board composed partly of Africans and partly of Europeans. The original scheme drawn up by the Government Conference in April, 1952, eliminated the post of Minister, and proposed an African Affairs Board of one elected or unofficial member drawn from each territorial legislature and one African from each territory, with an independent chairman appointed by the Governor-General. The Board was to be an independent body, and entitled to make, through the Prime Minister, representations in the interests of Africans in any matter within the legislative or executive authority of the Federation, and to lodge an objection to any Bill before the Federal Parliament which is regarded as a 'differentiating measure'. The London Conference in January, 1953, has made radical changes in regard to the Board. It will now be a Standing Committee of the Federal Assembly, composed of six members only, three Europeans and three Africans. The Europeans will be the members of the Assembly specially elected or appointed with responsibility for African interests; and the Africans will be selected by a majority vote of the six African members of the Chamber, and these three special European members. They will be then one of the two African members elected from each territory. The Governor-General will appoint the Chairman and Deputy-Chairman from among the members of the Board. Any decision will be made by a majority vote of the members present and voting. The Chairman will almost certainly be a European. The Secretaries of State, in their Introduction to the Report of the London Conference, regard the changes as a marked improvement, because the members will be able to take their full part in the parliamentary debates on any legislative proposal at all stages.[18]

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[17] *Loc. cit.*, p. 22.

The functions of the Board, as well as its composition, have been changed in the new scheme. They will be (1) to make to the Prime Minister representations in relation to any matter within the legislative or executive authority of the Federation, in the interests of Africans; (2) if a Territorial Government requests it to give to that Government any assistance in relation to the study of matters affecting Africans; (3) to draw attention to any Bill introduced into the Assembly, and to any Instrument which has the force of law, if it is in their opinion a 'differentiating measure'.[19] A 'differentiating measure' means a Bill or

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[18] Cmd. 8753, p. 7.

[19] Cmd. 8754, pp. 25–26.

Instrument by which Africans are subjected or made liable to any conditions, restrictions or disabilities to which Europeans are not also made liable, or a Bill or Instrument which will, in its practical application, have such an effect.[20] If the Assembly nevertheless passes the Bill, the Board may present to the Speaker a request that the Bill shall be reserved for the signification of Her Majesty's Pleasure, on the grounds that it is a differentiating measure. The Speaker passes the request to the Governor-General, who, when the Bill is presented for his assent, must reserve it for the signification of Her Majesty's Pleasure and send the Board's request to the Secretary of State with the Bill. The section, however, contains an exception to this rule; the Governor-General, in his discretion, may assent to such a Bill (1) if he is satisfied that it is not a differentiating measure, and that the reasons given by the Board are irrelevant or frivolous, or (2) if he is satisfied, upon representations made by the Prime Minister, that it is essential in the public interest that the Bill be brought into immediate operation. However, if he does so assent, he must forthwith send to the Secretary of State the Bill, together with the Board's request and a statement of his reasons for assenting.[21] There is similar power of objection by the Board to subordinate legislation as a differentiating measure, and the Secretary of State, within twelve months after receiving the Board's Report, may disapprove the measure.

The Federal Legislature in the present scheme is subject to much the same control by the British Government, as was the legislature in a mandated territory. The Constitutional provisions for the protection of the African peoples are safeguarded in the same way as the terms of the former mandate instruments.[22]

EXECUTIVE POWER

The executive authority of the Federation is (1) the Governor-General appointed by the Crown, (2) a Prime Minister and other Ministers appointed by him, (3) an Executive Council, which is a form of Cabinet, composed of Ministers, but not all of them. The Governor-General is required to act in accordance with the advice of the Executive Council (Cabinet) in the exercise of the powers conferred on him by the Constitution, except where those powers are stated to be exercisable by him in his discretion. In the appointment of the Prime Minister and Ministers the normal constitutional conventions will be followed. The Governor-General is in a position between that of the governor in a colony with responsible government and the governor in a Crown colony. As regards matters affecting Africans he acts in his discretion.[23]

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[20] *Loc. cit.*, Article 59.
[21] *Loc. cit.*, Articles 62 and 63.
[22] *Loc. cit.*, Chap. 3.

FISCAL PROPOSALS

The financial part of the Federal Scheme was worked out by the Fiscal Commission which was directed to assess the effect of the creation of a federation on the public expenditure of the federal area as a whole, and in particular to estimate, after taking account of the transfer of assets and liabilities involved, the net cost of (1) federal services, (2) services remaining to the territorial governments. It was also to consider how the revenue required should best be collected and distributed between the federal and territorial governments, what form of taxation on incomes would be best adapted to the needs of the federal system, and the co-ordination of loan policies and the establishment of a Customs Union.[24]

The Commission provided unanimous recommendations on all points. The prospective revenue would meet all the expenditure of the Federal and Territorial Governments, while leaving a substantial sum for development purposes of the three territories. The Commission stressed the need for the Federal Government to direct special attention to the development of the northern territories that are backward. The whole of the Customs and Excise Revenue should go to the Federal Government, except the duty on motor spirit, which will remain a territorial matter because of the differences about that duty in the three territories.

The main federal revenue would come from income tax, and there would be a uniform law in the three territories covering all taxes on income, whether for federal or territorial purposes. The federal share of the taxes should be 64 per cent, the share of Southern Rhodesia 13 per cent, of Northern Rhodesia 17 per cent (the difference between the two Rhodesias being due to the inclusion of European agriculture in Southern Rhodesia as a federal matter) and of Nyasaland 6 per cent. That division is subject to revision by an independent Commission, first after three years and then after periods of five years. In order to meet the conditions of financial autonomy of the territories, the territorial governments are authorised to levy a surcharge on persons and corporations, with the limitation that the maximum surcharge should be one-fifth of the payment made by the individual as federal income tax, or one-fifth of the federal rate for a corporation. In case of emergency, the Federal Government may impose a surcharge, which has not to be divided between the territories.

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[23] *Loc. cit.*, Chap. 4.
[24] Cmd. 8573, Chap. 6.

Part of the public debts of the three territories will be transferred to the Federal Government. The Governor-General will appoint an apportionment commission composed of a chairman nominated by himself, and one by the Governor of each of the territories. It is stated in the Draft Constitution that the Commission will be guided by the principles set out in the Report of the Fiscal Commission.[25] Nothing is said in the Constitution about the taking over of the railways, although that matter is dealt with in the Report of the Fiscal Commission. But it would seem that the transfer is contemplated, because the provisions about federal legislative power have a note with regard to trades unions and industrial conciliation on the railways.[26]

External loans should be controlled, as in the Commonwealth of Australia, by a special Loan Council, composed of a Minister of the Federal Government nominated by the Governor-General, and one representative of each Territorial Government, nominated by the Governor. The Loan Council must be unanimous in approving the loan programmes submitted by the Federal and Territorial Governments. If they do not so approve they may, by unanimous decision, allocate a smaller amount between the Federation and the Territories. But if they are not unanimous, the proportions are laid down in the Constitution, being the same as for the distribution of the income tax.

CUSTOMS UNION

The Report of the Commission contained elaborate proposals about the Customs Union. All that is said in the new Federal Scheme is negative. No territorial law will provide for the imposition of any tax or duty which restricts freedom of movement of goods between the territories.[27] The Fiscal Commission recommended that there should be a unified tariff on goods of foreign origin, and presumably it is the intention that the Federal Parliament, when elected, will introduce such a customs tariff. A difficulty arises because Nyasaland and a part of the territory of Northern Rhodesia are within the Congo Basin area in which any preferential tariff is excluded. In the other areas of Northern Rhodesia and in Southern Rhodesia preferential tariffs are in force and, it is recommended, should be maintained. The Commission put forward a plan which would allow for preferential tariffs in the free zones, while excluding them where they are at present excluded. In case of goods imported into Southern Rhodesia at preferential rates, and later removed to Nyasaland and the Treaty region of Northern Rhodesia, there would be a further duty equal to the difference between the duty leviable in the territory at the general rate. Correspondingly there would be a rebate on goods removed from Nyasaland or that section of Northern Rhodesia in the opposite direction.

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[25] Cmd. 8754, Article 99.

[26] *Loc. cit.*, p. 11, note 5.

A Tariff Commission should be appointed to work out a new unified tariff, and the Customs Union should be implemented after one year. New fiscal arrangements will be required with the Union of South Africa to replace the present agreements that Southern and Northern Rhodesia have with the Union.[28]

FEDERAL CIVIL SERVICE

The Civil Service Preparatory Commission drew up a scheme of the Federal Executive Government. It proposes that there be six Ministers, including the Prime Minister, who would also be Minister of Foreign Affairs and Defence, and one without portfolio. There would be five secretaries. Certain major departments of Government would be taken over entirely by the federal authority, *e.g.*, health, European education and all higher education, posts and telegraphs, income tax, customs and excise. In the sphere of education they propose a university in Southern Rhodesia and an African college for the three territories. The police would, for the time being, be a territorial service, but they recommend the appointment of a Federal Inspector-General to work towards adoption of unified standards of recruitment, training and procedure. Other departments of government, such as roads, for which legislation would be vested in both federal and territorial authorities, would be divided. A central federal planning staff would co-ordinate development, while the executive or constructional work would be carried out by territorial departments, as agents for the Federal Government.

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[27] *Loc. cit.*, Article 74, p. 29.
[28] Cmd. 8672.

The federal scheme prescribes that the Governor-General shall establish an interim Federal Public Service Commission, pending legislation by the Federal Parliament. Power is given to the Governor of the Territory, at the request of the Governor-General, to post an officer of the Territorial Public Service on secondment for employment in the Federal Public Service, for a period of five years. Transfer to the Permanent Federal Service of the present officers, subject to this condition, will be voluntary. The Report of the London Conference stated (paragraph 35) that the Constitution will lay down the principles governing eligibility for employment in the service of the Federal Government. The draft scheme, however, includes an article (112), which states that no person domiciled within the federation, who is a subject of Her Majesty or a person under Her Majesty's protection, will on grounds of race only be ineligible for employment in the service of the Federal Government. Apparently agreement was obtained on that principle at the last moment.

THE FEDERAL JUDICATURE

The third Commission dealt with the Federal Judicature, and the revised scheme provides for a Federal Supreme Court consisting of a Chief Justice and not less than two or more than six judges appointed by the Governor-General. They can be removed only on an address from the Federal Assembly praying for removal on grounds of misbehaviour or infirmity of mind or body. The Supreme Court will have original jurisdiction (1) in any dispute between the Federation and a Territory, or between Territories, so far as that dispute involves any question on which the extent of a legal right depends; (2) in any question as to the rights of a person to be or remain a member of the Federal Assembly; (3) in any matter in which an order of mandamus or an injunction is sought against a federal officer. In proceedings in a territorial High Court, on the request of any authority or on its own motion, the Court may reserve a constitutional point for consideration by the Federal Supreme Court. In proceedings in any subordinate court, the judge presiding may apply to the High Court for an Order that a constitutional point shall be referred for the consideration of the Supreme Court.[29] The Supreme Court will also have exclusive jurisdiction to determine appeals from the High Court on the interpretation of the Federation or territorial Constitution. The federal law may give the Supreme Court jurisdiction to determine appeals from the High Court of a territory on any other matter, except where the territorial legislation provides that the decision of the High Court is to be final. The court will not have any original criminal jurisdiction. The Judicial Commission suggested that the Federal Government would institute a prosecution in the territorial courts for a contravention of the federal law.

A proposal for giving an intermediate right of appeal, which now exists, on questions of Roman-Dutch law to the Appellate Division of the Supreme Court of South Africa was not recommended. Such questions arise particularly in Southern Rhodesia, and the Commission recommended that in case of a conflict between the decision of the Supreme Court and of the Appellate Division (in South Africa) the remedy should be by legislation in Southern Rhodesia.

AMENDMENT OF THE CONSTITUTION

The last section of the draft Federal Constitution is headed 'Miscellaneous'. It includes a provision that English will be the official language of the Federation. A provision in the earlier scheme, by which federal laws might be laid on the table of a territorial legislature for a fixed period, after which their validity cannot be questioned in any court, has not been retained. The main provisions of this section concern the amendment of the Constitution. No Bill to that effect shall be introduced into the Federal Assembly till after ten years from the date of the coming into force of the Constitution, unless a draft has been laid before the legislature of each of the three territories and each has passed a resolution that it does not object. Whether that clause is a sufficient safeguard against changes that would be detrimental to the Africans may be questioned. At the same time it is contemplated that the Constitution shall be reviewed after the ten years. Between the seventh and the ninth year a Conference is to be convened of delegations from the Federation, each of the three territories and the United Kingdom, for the purpose of review. Any amendment of the Constitution must be passed by a two-thirds majority of the total membership of the Federal Assembly, excluding the Speaker. The law must be reserved by the Governor-General for the signification of Her Majesty's pleasure, and the assent of the Crown must be by Order in Council if any territorial legislature by resolution objects to the Bill or any provision in it, within sixty days after it has been passed by the Assembly, or if a request has been made by the African Affairs Board that the Bill shall be reserved on the ground that it is a differentiating measure. As a further safeguard, the draft of the Order in Council signifying the Royal Assent must be laid before both Houses of Parliament in England, and objection may be received within forty days. The power to amend the Constitution will include power to establish a second chamber of the Federal Legislature, and prescribe its functions. The Constitution of the Federation in the present scheme will be rigid, nearly as difficult of amendment as the Constitution of the United States or the Charter of the United Nations, subject, however, to the provisions for the reviewing conference.

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[29] *Loc. cit.*, Article 125.

FEDERAL CITIZENSHIP

The Draft Federal Scheme has no provision about common citizenship. The Report of the Official Conference in 1951[30] contained a clause recommending its institution, but pointing out difficulties arising from the differing constitutional status of the three territories. The citizens of Southern Rhodesia are British subjects under the British Nationality Act, 1948. On the other hand, persons born in the two protectorates are not British subjects but British protected persons, though they can apply for naturalisation as citizens of the United Kingdom and Colonies, and thereby become British subjects by virtue of residence. A federal law could establish a single citizenship of the Federation of British Central Africa, like the law passed in 1952 by the Malaya Federation, and this would be useful for practical purposes and help to instil a sense of solidarity and loyalty to British Central Africa. Under the present provisions of British nationality law, however, the federal law would not make these citizens also British subjects. The position would be similar to that which operates in the Federation of Malaya. A person born in the British colony, *e.g.*, Penang, may be a citizen of the United Kingdom and Colonies, a citizen of Malaya and a British subject. A person born in a Malay State is a citizen of Malaya and a British protected person. So the persons born in Southern Rhodesia would have a second citizenship, and remain British subjects, while persons born in the northern territories would have two citizenships but not be British subjects.

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[30] Cmd. 8233, para. 98 and Annex 10.

CONCLUSION

The prospects of the Federation are obscure, in face of the solid objection of the African spokesmen to what they regard as a menace to the maintenance of the protection of the British Government. The opinion of the white settlers also, in Southern and Northern Rhodesia, is divided and the outcome of the plebiscite in Southern Rhodesia is uncertain. The African Chiefs have given warning that to impose a federation by force would mean trouble. At the same time, the need for closer association of the three territories for economic and social development is indisputable. It is urged by some that the purpose could be achieved on the lines of the East African Union, by setting up an executive body for this specific purpose, and a legislative body which would have the limited powers necessary to enact legislation for this purpose. Both bodies could fairly represent the Europeans and Africans, and the racial suspicion evoked by the Federal Scheme might be avoided.

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CONSTITUTIONAL EXPERIMENTS IN BRITISH WEST AFRICA

D. C. Holland

The purpose of this paper is to examine the Constitutions of the four British West African territories—Gambia, Sierra Leone, the Gold Coast and Nigeria—and to consider the desirability of, and the problems arising out of, the developments which are now taking place. These four territories comprise an area of almost 500,000 square miles and contain a population estimated at 32,000,000. By far the smallest is Gambia with its 4,000 square miles and population of only 276,000; Sierra Leone contains about 2,000,000 people in an area of 28,000 square miles; the Gold Coast has a population of about 4,333,000 in an area of 92,000 square miles; Nigeria, far and away the biggest, has an estimated population of 25,000,000 and comprises an area of 373,000 square miles.

Bearing in mind that these territories form only a small part of British overseas dependencies and contain less than half of the British Colonial population, the difficulties of efficient control and development of the Colonies from London are apparent. Nigeria itself is almost four times the size of the United Kingdom and larger than any European country except Soviet Russia. The fact that one man, the Secretary of State for Colonial Affairs is ultimately responsible for the entire British Colonial Empire has been frequently criticised and it has been suggested that efficiency would be greatly increased by dividing his responsibilities and creating a separate Secretary of State for the African Colonies.[1] In recent years, however, there have been many changes which have diminished the force of this suggestion. There has been a considerable devolution of power in many areas and the problem is clearly much less urgent than it was.

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[1] See, for example, Ivor Thomas, *The African Colonies; The Case for a separate Secretary of State, The Times Review of the British Colonies,* March, 1951, p. 3; see, however, on the other hand, an article by Miss Perham in *The Times* newspaper, October 28, 1952, where the amalgamation of the Commonwealth Relations and Colonial Offices is proposed on the ground that as the more advanced territories attain full self-government, the remaining dependent territories will 'more deeply resent their continuing *public* tutelage'.

In British West Africa alone the developments now taking place must considerably diminish the responsibilities of the Secretary of State for Colonial Affairs. Almost all responsibility for the Gold Coast has already been shed and Nigeria, too, has travelled far along the road towards complete self-government. Sierra Leone and, still more, Gambia, lag behind in this move towards self-government, but here too there can be little doubt of the ultimate aim of the United Kingdom Government. However, whilst not doubting the sincerity of the declarations made by successive Colonial Secretaries that the aim of British Colonial policy is self-government within the Commonwealth, the declarations clearly require amplification. The questions 'self-government for whom?' and 'self-government when?' need to be answered if the declarations are to have any meaning. Fortunately, the first question raises no major difficulties in the West African Colonies. The populations are relatively homogeneous and the problem of the white settlers does not exist, as it does in Kenya where the task of conferring self-government is complicated by the necessity of avoiding the infliction of hardship on any one section of the population. In the West African colonies the question of when to grant self-government, and of the form of government, may be difficult, demanding high qualities of statesmanship on all sides, but the general direction of the policy is clear. The problems of the speed with which self-government should be granted, and of the form of government, can only be considered after examining the developments which have in fact taken place in West Africa and the degree of success which has accompanied them.

GENERAL POLICY

The general policy of British Governments in relation to Colonial Constitutions seems to be to adopt the United Kingdom as a model and to attempt to reproduce in the Colonies the historical development of the United Kingdom Constitution in a period appropriate to each particular colony. This, of course, is natural for 'every imperial power, whether it does so deliberately or not, tends to transmit to its overseas territories its own political ideas and methods. . . . In the ordinary way the modern British Constitution is the model, and it is restricted in various ways. Every feature in a British Colonial Constitution has its counterpart in British history. Thus, the Governor is in many ways like the Sovereign—not a twentieth century monarch, but one of the Tudor period. The Executive Council corresponds to the Cabinet—not, in the majority of cases, a modern British Cabinet, but one of, say, the late Stuart period. The legislature may consist of one or two chambers and the lower house may . . . be elected by universal franchise, or in some colonies the franchise may be restricted as it was in the United Kingdom at one time. Political progress tends to be conceived in terms of removing the restrictions—limiting the veto power of the Governor, increasing the representative character of the Executive and Legislative Councils, reducing the minimum qualifications for voting, and so on'.[2]

This general feature of British Colonial policy is, of course, displayed in the British West African Colonies, as elsewhere. The Gold Coast has now reached a stage where its Constitution corresponds largely to the modern British Constitution; Sierra Leone and Gambia reproduce the British Constitution of earlier days. The British Government does, however, sometimes make adaptations to suit local conditions, and in Nigeria we find that the British model has been to some extent abandoned by the adoption of the principle of federalism. It is proposed to examine in this paper the provisions of the Gold Coast Constitution as representing the usual aim of British Colonial policy; then to consider the variations adopted in the Nigerian Constitution; and finally, the stages of development reached in Sierra Leone and Gambia. An assessment of the correctness of British Colonial policy in the Constitutional field in West Africa and the desirability of more or less speed in its execution can then be attempted.

THE GOLD COAST

The Constitution of the Gold Coast is embodied in the Gold Coast (Constitution) Order in Council, 1950,[3] as amended by subsequent Orders in Council of 1952,[4] and conforms closely to the recommendations of the all-African Coussey Committee which reported in 1949.[5] Its model is the British Constitution involving a sovereign legislative assembly elected by popular vote and an Executive, composed of representative members of the Legislature, responsible to that Legislature. However, it still departs from the British model in several important respects—in some cases disadvantageously, in other respects, it seems to me, advantageously—as we shall see as we now consider the detailed provisions of the Constitution.

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[2] *The Hansard Society, Problems of Parliamentary Government in Colonies* (1952), p. 27.

[3] S.I. 1950, No. 2094.

(1) *The Legislature.* First, as to the Legislature: this consists of one chamber only, the Legislative Assembly, which is composed of the Speaker, three *ex officio* members, six special members, and seventy-five elected members. The Speaker, it may be observed, is not required, or even allowed, to be one of the *ex officio,* special, or elected members of the Assembly. He is elected by the members of the Assembly by secret ballot. They may not elect an *ex officio* member, and, although they may elect an elected or special member to the office, he must vacate his seat as such a member if this happens. Nor, of course, is the Speaker allowed to stand for election as a special or elected member of the Assembly.[6] Thus the problem of the unrepresented Speaker's constituency which results in the United Kingdom from electing one of the members of the House to the office of Speaker is avoided in the Gold Coast. The United Kingdom practice with regard to the Speaker's constituency has been frequently criticised, but these criticisms are always met with the argument that the Speaker's authority depends on the fact that he is an ordinary member of the House, recognised by private members as one of themselves.[7] The Gold Coast departure from the United Kingdom practice in this respect may well have been dictated by difficulty in finding a man from

[4] S.I. 1952, Nos. 455 and 1039.

[5] *Report of the Committee on Constitutional Reform,* Colonial No. 248 of 1949, published by H.M. Stationery Office.

[6] Sections 34, 43 and 44 of S.I. 1950, No. 2094. The *Colonial Office Report on the Gold Coast* for 1951 (published by H.M. Stationery Office) misleadingly only points out that the Constitution does not *require* the Legislative Assembly to elect one of its own members as Speaker and that the first Speaker was not a member when elected; this corresponds with the Coussey Committee's recommendation, but not with the Constitutional provision adopted.

[7] See, for example, *The Times* newspaper, January 16, 1951.

amongst the members with the necessary experience for the task, coupled with the danger of partiality in a member Speaker owing to lack of tradition and the small numerical strength of the Assembly.[8]

The three *ex officio* members of the Gold Coast Legislative Assembly are the Minister of Defence and External Affairs, the Minister of Justice and the Minister of Finance.[9] The presence of these *ex officio* members in the Assembly clearly severely limits the grant of self-government and constitutes one of the principle deviations from the present British Constitution. As we shall see, these three are also *ex officio* members of the Executive Council (otherwise referred to as the Cabinet) and, clearly, until they are replaced by representative African Ministers, complete self-government cannot be said to have been granted. The arguments for and against their retention will be considered later.

Of the six special members of the Assembly, three are chosen by such Chambers of Commerce of the Gold Coast as the Governor may in his discretion direct in writing and three by the Gold Coast Chamber of Mines. In both cases the election procedure is subject to the written instructions of the Governor acting in his discretion; the procedure which has been specified is direct vote by secret ballot. It may be noted here that where the Governor is empowered to act in his discretion, he is free to act without consultation with the Prime Minister or the Cabinet. Of these six special members not more than two are entitled to vote upon any question proposed for decision in the Assembly and these two voting members must be nominated at the commencement of each Session by the Chambers of Commerce and Mines.

Finally, the Assembly contains seventy-five elected members, (a) thirty-seven representing the Gold Coast Colony and the Southern Section of the Trusteeship territory of Togoland (twelve territorial members, twenty-one rural members, and four municipal members), (b) nineteen members representing Ashanti

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[8] Thus, in Australia, the member-Speaker has frequently displayed bias and it has been suggested that this is due to (1) the absence of a different tradition, (2) the smallness of Government majorities which arises from the smallness of the total membership of the Legislative; *The Hansard Society, Parliamentary Government in the Commonwealth* (1951), pp. 76–77.

[9] S.I. 1952, No. 455. Under S.I. 1950, No. 2094 they were styled the Chief Secretary, Attorney-General and Financial Secretary.

(six territorial, twelve rural and one municipal), and (c) nineteen members representing the Northern territories and the Northern Section of the Trusteeship territory of Togoland.

These elected members are chosen by a variety of methods. The five municipal members are elected by direct vote based on universal adult suffrage, all those who are British subjects or British protected persons of 21 or over and own or occupy assessed premises for the preceding six months being entitled to vote; the thirty-three rural members are elected indirectly by electoral colleges which are in turn elected on a universal adult suffrage basis, the qualifications for voting in this case being that a person is a British subject or British protected person of 21 or over, has resided in the area for the preceding six months and has paid local tax if liable to do so; the territorial members are elected by councils consisting of native chiefs and members of native authorities; and the Northern Territories members are elected by a single electoral college of 120 members representing local authorities. It will thus be seen that of the seventy-five elected members, thirty-eight (that is, the rural and municipal members) are elected directly or indirectly by popular vote (with universal suffrage), whilst of the remainder many are representative of traditional native authorities. In this way some degree of balance is achieved between the new political leaders of the Gold Coast and the traditional (or Chiefly) authorities, with the former element preponderating over the latter—a feature which is now being repeated at the local government level.

The problem of securing co-operation between the new political leaders and the traditional native authorities, through whom the British Government were wont to work, is clearly difficult, but nevertheless one that has to be solved if the new constitutions are to work.[10]

That Dr. Nkrumah intends to work in this direction is shown by his recent statement that it was for the Chiefs and the people to consider whether the Assembly affords the best representation of the country which can be devised and whether a second House should be established.[11] It may well be that the ultimate solution will be a Lower House wholly elected by popular vote and an Upper House with restricted powers, representing the traditional authorities in the country, so bringing the country more into line with the United Kingdom.[12] It will be later observed that the Northern and Western Nigerian Regional Legislatures follow the two chamber plan, one to represent traditional native authorities and the other the people. There seems no reason why the Chiefs should not continue to play a part in the government of the country provided they can adapt themselves to the changed political situation. However, one necessary reform seems to be the abolition of the Governor's present discretionary power to grant recognition to and withhold recognition from Chiefs.

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[10] See *The Hansard Society, Problems of Parliamentary Government in Colonies* (1952), pp. 48–52.

[11] *The Times* newspaper, October 17, 1952. It may be noted that the Convention People's Party, of which Dr. Nkrumah is the leader, recommended the creation of an Upper House for the Chiefs in its election manifesto issued prior to the 1951 elections.

The present composition of the Gold Coast Legislature is the result of elections held in 1951. In this election the Convention People's Party, headed by Dr. Nkrumah, achieved a sweeping victory, winning thirty-four of the thirty-eight seats which were filled, directly or indirectly, by popular vote. Of these thirty-eight seats it has proved impossible to assess how many rural members (in theory elected indirectly) were in fact elected directly as a result of a definite mandate from the electors to the electoral college member. It will be interesting to see whether the electoral college system continues when the need for it, namely illiteracy and lack of political knowledge, disappears, and whether, if it does so continue, a convention develops binding the electoral college members to vote for an indicated candidate. Dr. Nkrumah's victory was won in a perfectly fair contest, despite the many difficulties involved, including the fact that no literacy qualifications were imposed and that almost four-fifths of the electorate proved in fact to be illiterate—a point to which I shall return later. Of the people entitled to be registered it appears that only 40 per cent took advantage of this. For this there were a variety of reasons, predominantly a fear that registration was a prelude to military conscription or taxation—a healthy suspicion of officialdom which some might think the people of the United Kingdom would do well to note.

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[12] The Coussey Committee, by a majority of 20 to 19, recommended a bicameral legislature with the second chamber consisting of chiefs and having restricted powers corresponding to those of the United Kingdom House of Lords. The arguments for and against such a bicameral legislature are summarised on p. 55 of the Coussey Report, Colonial Office No. 248 of 1949.

The Legislature which has resulted from these elections is the first in which all areas of the Gold Coast, that is, the Colony, the Protectorate, and the Trusteeship territory of Togoland have been represented.

The qualifications and disqualifications for membership of the Legislature to a large extent reproduce the United Kingdom rules, but there are certain variations. The principal qualifications are that a member must be a British subject or British protected person, 25 years of age or over, and have sufficient knowledge of English to be able to take part in the proceedings of the Assembly. The principal disqualifications include the usual cases of bankruptcy, lunacy, imprisonment for more than twelve months, and election offences. In addition it is interesting to observe that holders of public offices are disqualified and the United Kingdom practice of debarring the permanent civil service from political activities thereby adopted. Dr. Nkrumah has recently emphasised the importance of retaining the principle when he said, 'it should be remembered that the provisions of the Constitution relating to the Civil Service were designed to perpetuate the best British tradition that the Civil Service should be kept completely free from political influence'.[13] There are also one or two departures from the rules applicable to the United Kingdom House of Commons. In addition to the fact that the Speaker, as already pointed out, is debarred from membership, there is a slight difference in the position of Government contractors. Whereas in the United Kingdom the disqualification of Government contractors is absolute, in the Gold Coast he is not disqualified for election if within one month before the election, he publishes in the *Gazette* a notice setting out the nature of his contract and his interest in it. This seems preferable to the United Kingdom rule. Furthermore, although a member's seat becomes vacant on his becoming a party to a Government contract, the Assembly is empowered to waive the disqualification provided the contracting member notifies the Speaker of the contract as soon as practicable. There are also provisions in the Constitution for voluntary resignation and removal for absenteeism. Any member of the Assembly, except *ex officio* members, may resign simply by giving notice in writing to the Speaker; and if a member is absent from two consecutive meetings of the Assembly, without the Speaker's permission, his seat automatically becomes vacant. In the United Kingdom the ancient office of Steward of the Chiltern Hundreds and the exigencies of party discipline probably make provision for resignation and absenteeism unnecessary.

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[13] *The Times* newspaper, October 17, 1952.

Any dispute as to the right of a special or *ex officio* member to be or remain a member is to be determined by the Governor acting in his discretion. Any dispute as to the right of a person to be or remain an elected member is to be determined by the Supreme Court of the Gold Coast in accordance with the law of the Gold Coast.

The function of legislating is conferred on the Governor and Legislative Assembly by section 50 of the Constitution, which empowers the Governor, with the advice and consent of the Legislative Assembly, to make laws for the peace, order and good government of the Gold Coast. This wide power of legislating is, however, subject to two important limitations. First, any law which is repugnant to the Trusteeship Agreement in respect of Togoland is, to the extent of such repugnancy, void. This provision is obviously essential and needs no comment. Secondly, any law which makes persons of any racial community liable to disabilities, to which persons of other such communities are not liable, is void. In this respect the Gold Coast departs from the basic United Kingdom idea of a sovereign legislature fettered only by the spirit of its members and public opinion, and instead follows the pattern of the Indian and Ceylon Constitutions, where similar but more elaborate safeguards had been previously imposed. It is interesting to observe that the Ceylon Constitution not only makes void any law imposing special disabilities on particular communities and religions but also renders void any law conferring special privileges on particular communities and religions.[14] It may be that conferring special privileges on some necessarily involves imposing special disabilities on others, and that the Gold Coast Constitution is wide enough in this respect. However, a further provision on the lines of the Ceylon provision could have removed all doubts on the matter. Of course, racial toleration and co-operation must necessarily depend in the last resort on the attitude of mind of the people and cannot be secured by legislation alone. Nevertheless, a legal provision preventing the passing of laws involving racial discrimination is a valuable safeguard, particularly if the provision is made difficult to amend or repeal. Such a difficulty does exist in the Gold Coast because of the provisions in the Constitution that any amendment or repeal of the Constitution must be reserved by the Governor for the Royal assent. Whether further safeguards against infringements of fundamental rights and liberties should be provided in Colonial Constitutions is a question discussed later in this paper.

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[14] See Sir Ivor Jennings and H. W. Fambiah, *Ceylon* (1950), 7 *The British Commonwealth Series*, p. 75.

There is a further limitation on the legislative power of members, corresponding to that existing in the United Kingdom in relation to money bills. Just as in this country money bills require the Queen's recommendation which is signified by a Minister, so in the Gold Coast money bills require the Governor's consent and he is required to act on the advice of the Cabinet. The recommendation of the Governor, but this time acting on his own initiative, is also required for bills and motions which affect the salary or conditions of service of public officers, and in this case the Governor is further required to reserve the bill for Her Majesty's pleasure if it prejudicially affects any public officer. Similarly the prior consent of the Governor, acting in his discretion, is required for any bill which would provide for the determination, otherwise than by the Governor acting in his discretion, of questions relating to the election or deposition of any Chief, the recovery or delivery of Stool property, and political or constitutional relations between Chiefs under native customary law. The United Kingdom Government thus retain some control over, and responsibility for, native affairs and the Civil Service.

The reservation of certain legislative power to the Governor constitutes a further serious limitation on the grant of self-government to the Gold Coast. By section 58 of the Constitution, if the Governor considers that it is expedient in the interests of public order, public faith or good government that any bill or motion introduced in the Assembly should have effect, and the Assembly fail to pass it in such time and form as the Governor thinks reasonable and expedient, the Governor may declare that such bill or motion shall have effect. The expressions 'public order, public faith and good government' are declared to include the responsibility of the Gold Coast as a territory within the British Commonwealth and all matters relating to the creation and abolition of public offices and salaries and conditions of service of public officers. However, the Governor's reserved power is not entirely unlimited. He must, before exercising the power, communicate his intention to the Cabinet, and if the Cabinet do not support him, then he must obtain the authority of the Secretary of State for Colonial Affairs, unless urgency demands immediate action in which case he may act and then report to the Colonial Secretary.

Finally, as checks on the legislative power of the popular Chamber, there are the usual important constitutional provisions regarding assent, reservation and disallowance. No bill may become law unless the Governor acting in his discretion assents to it,[15] and the law, if he does assent, may still be disallowed at any time by Her Majesty acting on the advice of the Colonial Secretary. The Governor is further prohibited from assenting to certain bills without first obtaining the approval of Her Majesty acting on the advice of the Colonial Secretary; these include bills which are inconsistent with the Constitution and bills to regulate or determine the privileges, immunities and powers of the Assembly or its members, which must not in any case exceed those of the United Kingdom House of Commons and its members.

The Legislature whose constitution and powers have been outlined is dissolved by the Governor acting on the advice of the Cabinet and must be dissolved after four years.

(2) *The Executive.* Just as the Gold Coast Legislature is modelled on the United Kingdom Legislature but exhibits certain limiting variations, so on the Executive level, the Gold Coast goes a considerable way along the road to responsible self-government modelled on the United Kingdom system, but again falls short in certain important respects. First, the Governor

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[15] Any statutory restriction on the Governor's discretionary power to refuse assent to bills would apparently be a departure from the established and universal constitutional position in relation to both Colonies and Dominions. The Coussey Committee on the Gold Coast recognised this and accepted the continuation of a legally unrestricted power to refuse assent to bills on the understanding that assent would not in fact be refused against the advice of the Executive Council except after consultation with the Secretary of State for Colonial Affairs; Colonial Office No. 248 of 1949, pp. 65–66.

is not always required to act on the advice of the Executive Council (*i.e.*, Cabinet) or Prime Minister. Secondly, the method of choosing the members of the Cabinet, the powers of the Prime Minister, and the responsibility of the Cabinet are not quite the same as in the United Kingdom.

Although the Executive Council is, by section 5 of the Constitution, the principal instrument of policy for the Gold Coast, it is an instrument which may be disregarded by the Governor in certain cases. Normally the Governor, like the Monarch in the United Kingdom, is required to act on the advice of his Cabinet, but the exceptions are wide. There are, in the first place, certain powers, mentioned above, conferred on the Governor which he is expressly authorised by the Constitution to exercise on his own discretion, for example, assenting to bills.[15] In addition, it has been provided by Royal Instructions[15a] that the Governor may with the prior approval of the Colonial Secretary, or even without such approval if urgent necessity so requires, act against the advice of the Cabinet 'if he considers it expedient in the interests of public faith, public order, or good government'. The Governor is clearly far from being in the position of a constitutional monarch whilst these discretionary powers exist.

The Cabinet is composed of the Governor himself, three *ex officio* members and eight representative members chosen from the Legislative Assembly. The three *ex officio* members are those already mentioned—the Ministers of Defence and External Affairs, Justice and Finance—and over the choice of persons to occupy the posts, the Gold Coast Prime Minister has, of course, no control whatsoever. So far as the representative Ministers are concerned, the Governor first chooses the Prime Minister. In making the choice he acts on his own discretion, but his choice is subject to the approval of the Legislative Assembly. The Governor then, after consultation with, but not necessarily on the advice of, the Prime Minister, submits to the Assembly the names of the persons he proposes for appointment as the other representative Ministers, their appointment also being subject to the Assembly's approval.

The representative Ministers when appointed, but, of course, not the *ex officio* Ministers, are individually and collectively responsible to the Assembly, but not to quite the same degree as in the United Kingdom. Individual responsibility rests upon the facts that, first, a Minister remains such only while he is a member of Assembly and secondly he must be removed from office by the Governor if a two-thirds majority of the Legislative Assembly request it. Collective responsibility rests upon the fact that, as in the United Kingdom, when the Prime Minister falls, the rest of the representative Ministers fall with him. It may further be noticed that the Governor must revoke the appointment of a representative Minister if the Cabinet support a recommendation made by him to that effect, after consultation with the Prime Minister. In addition, a variation on the United Kingdom model is that the assignment of portfolios is decided by the Governor after consultation with, but not necessarily on the advice of, the Prime Minister. The *ex officio* Ministers are, of course, responsible only to the Governor, and not to the Legislative Assembly or Prime Minister.[16]

[15a] Dated December 26, 1950.

It will be observed that the Gold Coast Cabinet system, whilst resembling the United Kingdom system, yet deviates from it in important respects. These deviations have recently been referred to by Dr. Nkrumah in a speech in which he proposed various questions on which consultation between Chiefs and people should take place in order to enable the Gold Coast Government to formulate proposals for discussion with the United Kingdom Government.[17]

The first obvious question which arises is whether the three *ex officio* Ministers should be replaced by representative Ministers. At present these *ex officio* Ministers, as already stated, are not chosen or removable by the Prime Minister or Assembly and have no responsibility to any one except the Governor. However, as Dr. Nkrumah pointed out, their replacement by representative Ministers would raise certain difficulties. In the first place, if the *ex officio* Minister of Finance were replaced by a representative Minister, the Government considered that it would still need expert financial advice and would accordingly need a financial and economic adviser. Similarly, if the Minister of Justice were replaced by a representative Minister, the Government considered that it would still need him to act as legal adviser to the Government, in the capacity of Attorney-General. Finally, if the Minister of Defence and External Relations were replaced by a representative Minister, one implication would be that the Gold Coast is prepared to assume full responsibility for its own defence, which at the moment is borne mainly by Commonwealth Armed Forces; another implication would be that the Gold Coast is prepared to take full responsibility for protecting and maintaining its own external trade relations. The realistic and restrained approach to this problem displayed by Dr. Nkrumah, at one time considered by many to be an extremist, illustrates the truth of the proposition that a person rarely behaves responsibly unless given responsibility. It seems probable from this statement that Dr. Nkrumah will first press for the replacement of the Ministers of Finance and Justice by representative African Ministers, and be willing to leave a European *ex officio* Minister in charge of defence for the time being. However, as Dr. Nkrumah is at present in Liberia studying the Liberian Republic's defence system, overseas trade and diplomatic relations, it may well be that these studies will give the Gold Coast Government valuable information enabling it to arrange its own affairs in relation to these matters. This visit to the Liberian Republic may well be of major importance in its impact on the constitution of the Gold Coast and its relation to the United Kingdom. If the Gold Coast Prime Minister receives a good impression of the conduct of affairs in Liberia, it may well lead to a speeding up of the process of 'Africanisation' and independence.

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[16] This is a deviation from the Coussey Committee's recommendation. They recommended that the *ex-officio* Ministers also should be removable from office by a two-thirds majority resolution of the Legislative Assembly; Colonial No. 248 of 1949, p. 62.

[17] *The Times* newspaper, October 17, 1952.

In addition to the problem of the three European *ex officio* Ministers, Dr. Nkrumah raised the question of his own powers as compared with those of the United Kingdom Prime Minister. He pointed out that it would be more in accordance with British Constitutional practice if the appointment of a Prime Minister were made dependent on his willingness to form a Government, rather than on a resolution of the Assembly. Similarly, it would be more in accordance with such practice if the Prime Minister were free to choose and dismiss his own colleagues instead of being dependent on the resolution of the Assembly, and if the assignment of portfolios were removed from the ambit of the

Governor's powers. However, it may well be doubted where the United Kingdom constitution is a good model to follow with respect to the powers of a Prime Minister. There is a lot to be said for imposing a check on the power of a Prime Minister to choose the members of his Cabinet, and it might perhaps be better to bring the United Kingdom system into line with the Gold Coast system in this respect rather than vice versa.

The various questions outlined by Dr. Nkrumah and discussed above are at present being studied by chiefs and people in the Gold Coast. The Gold Coast Government, after consideration of the views put forward, intends to formulate its own proposals for discussion with the United Kingdom Government and a debate on the Gold Coast Government's proposals is expected to take place in the Legislative Assembly some time in the June session.

NIGERIA

To turn now to Nigeria, this country, like the Gold Coast, is today far along the road to complete self-government. As might be expected, its Constitution corresponds in many respects to that of the Gold Coast, but there are certain important differences with respect to form and degree of responsibility. In the first place the country is so large and the population so diverse that a federal form of constitution has been adopted. Under the 1951 Constitution, the country is divided into three regions, each with its own legislative and executive organs enjoying considerable powers, and in addition there is, of course, a Central Legislature and Executive. The form of federalism adopted corresponds more to that of Canada than to the Australian and American forms, that is to say, the Regional Legislatures have power only to legislate on certain specified matters and matters delegated by the Central Legislature, whilst the Central Legislature has a general power to legislate for the peace order and good government of the colony. Despite this, however, the validity of a regional law cannot be questioned in court on the ground that it relates to a matter beyond the powers of a Regional Legislature. Furthermore, where a central and regional law conflict, the Constitution provides that the one enacted last is to prevail.

In the second place, the composition of both the regional and the central organs of government deviates to some extent from the Gold Coast plan. The composition is such as to provide the traditional (or Chiefly) authorities with a stronger representation than exists in the Gold Coast. First, as to the Legislatures. In both the Northern and Western Regions the Legislature consists of two Houses—a House of Chiefs and an almost wholly elected House of Assembly and in neither region has the House of Assembly any power to override the House of Chiefs. Conflicts between the Houses are settled by calling a joint sitting of not more than twenty representatives from each House. In the Eastern Region, however, the Legislature consists only of a single House of Assembly which is almost wholly elected. The qualifications and disqualifications for membership correspond broadly to those existing in the Gold Coast; it is, however, interesting to observe that the age limit is fixed at 21, as in the United Kingdom, instead of 25, as in the Gold Coast, and that birth or residence in the Region, or one's father having been born in the Region, is a condition precedent to election to a Regional Legislature. In addition, in the Northern Region only males can be candidates. So far as the franchise is concerned, Nigeria corresponds broadly to the Gold Coast, the requirements for voting being that a person should be a British subject or British protected person, of 21 or over, resident in the area for twelve months or a native of the area, and have paid tax, unless exempt, during the preceding twelve months. However, in the Northern Region, the franchise, like candidature, is restricted to males. The Central Legislature consists only of one House, the House of Representatives, and all but twelve of its 148 members are chosen by Regional Legislatures, the method of choice being such as to assure the chieftains of adequate representation. Subject to the federal provisions regarding distribution of power, the powers of the Legislatures correspond largely to those of the Gold Coast Legislature, but the Governor's discretionary powers and the discretionary powers of the Lieutenant-Governors of the Regions are greater than in the Gold Coast. Thus, the Governor and the Lieutenant-Governors have a reserve power to legislate as in the Gold Coast, but their power is to be exercised by them in their discretion and they are not, as is the Gold Coast Governor, required to consult the Executive Council or Colonial Secretary. Similarly, there is a provision relating to money bills corresponding to that in the Gold Coast constitution, but again the

Governor's and Lieutenant-Governors' powers in Nigeria are to be exercised by them in their discretion.

With regard to the Executive organs of government in Nigeria, each Region has a Lieutenant-Governor and Executive Council and at the centre there is a Council of Ministers to assist the Governor. In both the three Executive Councils and the Council of Ministers there are representative Ministers chosen from the Legislative Houses and in each case the representative Ministers are in a clear majority. The method of choice is such as to ensure the Chiefs a representation, but a minority representation as compared with the elected members. As in the Gold Coast the appointment of representative Ministers by the Governor or Lieutenant-Governor is subject to the approval of the appropriate Legislative House and they must be removed if a two-thirds majority of the appropriate Legislative House requests it, so that they are to some extent responsible to the Legislature. However, there is not, as in the Gold Coast, a Prime Minister, whom the Governor has to consult with regard to appointments. In addition, as we have seen, the Governor and Lieutenant-Governors of the Regions have greater power to act without the advice of the Councils than is enjoyed in the Gold Coast. Furthermore, the Governor and Lieutenant-Governor have a power, not enjoyed by the Governor of the Gold Coast, to remove Ministers for failure to carry out the policy or decisions of the appropriate Council. Nigeria then, apart from the difference of form arising from its adoption of federalism, differs from the Gold Coast in the extent of its responsible self-government.

SIERRA LEONE AND GAMBIA

Sierra Leone, too, is still behind the Gold Coast in its progress towards self-government but has nevertheless made considerable progress. Its Legislature, a single chamber body, has since 1951 contained a majority of elected members. However, the elected members are not, as in the Gold Coast, chosen by universal adult suffrage. Only seven are directly elected by the people, and even in their case the franchise is restricted to British subjects or British protected persons, of 21 or over, domiciled in or ordinarily resident for the preceding twenty-four months in the area, owning or occupying property of an annual value of not less than £6 (£5 in some areas) and in receipt of an annual income of not less than £60. The remaining fourteen elected members are elected by District Councils as to twelve of them and by the Protectorate Assembly as to the other two, and neither of the bodies is elected directly by the people. Nevertheless, the inclusion of a majority of elected members even on such a restricted franchise is a step in the right direction. The Executive Council is required by Royal Instruction to consist of the Governor, four *ex officio* members, and not less than four appointed members who must be elected members of the Legislature. In fact, the Governor has appointed six such members, thereby giving them a majority on the Council. The Governor is to a considerable extent required to act on the advice of the Executive Council and it may well be regarded as a Cabinet in embryo. Further progress towards self-government cannot be long delayed. The form of its Constitution will ultimately, in all probability, be based on the Gold Coast model. In Gambia, however, little progress has yet been made, and the elected members of the Legislative Council are still very much in a minority. Until 1951 there was, in fact, only one elected member of the Legislative Council, but in that year the number was increased to three. Its constitution is so far removed from responsible self-government that examination of its form can be of little help in a study of the future of West African Constitutions.

CONCLUSIONS

It is apparent that in British West Africa the promise of self-government is being fulfilled. As was stated at the outset the only question is whether the promise is being fulfilled speedily enough and whether it is being fulfilled in the best possible way, that is, whether the types of constitution adopted are the best suited to the requirements of the Colonies.

So far as the speed of the advance towards self-government is concerned, the success of the Gold Coast experiment gives ground for saying that rapid progress will be found justifiable in these territories. Despite the many misgivings that were expressed with regard to the Gold Coast, based largely on Dr. Nkrumah's past speeches and activities, it seems to be generally agreed that the Gold Coast experiment has had considerable success. Since Dr. Nkrumah took office last year, he has by his admirable restraint and realism, illustrated by his attitude towards the question of the *ex officio* European Ministers, shown that a man's sense of responsibility can hardly be judged unless he is given responsibility. Often illiteracy and general backwardness amongst the majority of the population is said to be a good reason for withholding self-government. I have never been impressed by this argument. Provided there are sufficient men of ability and education to run the governmental services and provided also the country can achieve economic independence, it seems to me that self-government should not be withheld. Both the Indian experiment and the Gold Coast experiment have shown that literacy is not an essential qualification for voting. Nevertheless, it must be admitted that illiteracy and lack of education may well increase the risk of dictatorial action by the educated few when self-government is granted. Self-government is clearly not necessarily good government, although one can sympathise with the Filipino politician, Manuel L. Quezon, who once said that he preferred a government run like hell by Filipinos to one run like heaven by Americans.[18] Self-government may be a risky, but a none the less justifiable experiment despite the risk. One might perhaps aptly apply to the West African colonies the following words of Pandit Nehru: 'We have suddenly arrived at a stage when we have to run. Walking is not enough—and in running we tumble and fall and we try to get up again. It is no good anybody telling us to walk slowly. It involves risks and dangers, but there is no help and no choice for it for there is torment in our minds'.[19]

Nevertheless the danger of dictatorship and abuse of power inherent in self-government where the mass of the population is illiterate and uneducated does make it important that the constitution should be designed to diminish the risk as far as possible. Bearing this in mind it may well be doubted whether the British Constitution is the best possible model for colonial territories. In this country public opinion and tradition secure the acceptance by all parties of certain unwritten restrictions on power. In the colonies a written and rigid constitution containing a declaration of fundamental freedoms might well provide a better safeguard for democracy. It is true that 'unless the true democratic temper is present, the most beautifully devised political or economic machinery will result in nothing but slavery. If this temper is present, details of machinery matter little'.[20] Nevertheless, the existence of a written rigid constitution does make the reduction to slavery a step which is obviously illegal and, accordingly, more difficult to accomplish. Furthermore, the existence of a written constitution, containing limitations and guarantees, may well set up a standard of constitutional behaviour and have considerable influence upon political life. A written constitution is often regarded not as a mere selection of legal rules but as a political creed evoking popular respect and affection.

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[18] See *The Hansard Society, ibid.* (1952), p. 19.

[19] Speech at the eleventh conference of the Institute of Pacific Relations, Lucknow, October 3, 1950: *Hansard Society,* 6 *Parliamentary Affairs* (1952), p. 5.

If the form of the constitution is not designed to secure democracy, internal dissension and turmoil may well result. If the grant of self-government is not made when the time is ripe for it, ultimate secession from the Commonwealth may well be the consequence. It must be remembered that although the aim of British colonial policy is frequently said to be 'self-government under the Commonwealth', in fact complete self-government necessarily leaves a country free to choose whether to remain in the Commonwealth or not. Unjustifiable delay in granting self-government, and mistakes in the form of the constitution established, may both have disastrous consequences.

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[20] *Education for Citizenship in Africa,* a report of a subcommittee of the Advisory Committee on Education in the Colonies (1948).

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PEACETIME ESPIONAGE AND THE LAW

S. Prevezer

It is an unfortunate sign of the times that hardly a week should pass without mention in the newspapers of the term 'espionage', without reports of a new measure designed to suppress subversive activity, or of the trial of someone accused of threatening the safety of his country by betraying important information to a foreign power.

Quite apart from events taking place behind the so-called Iron Curtain, in which such trials have apparently become an almost recognised feature of daily life, the problem of safeguarding the internal security of a nation against the inroads of international doctrines, demanding an absolute allegiance and transcending State boundaries, is very evident to-day—in England, since the war, there have been three instances of espionage activity which have resulted in successful prosecutions under the Official Secrets Acts[1] and at least three mysterious disappearances abroad of well-connected persons who formerly had access to confidential information[2]; in Canada a Royal Commission was appointed to investigate the spy network which came to light when, on September 5, 1945, a cypher clerk in the Soviet Embassy in Ottawa walked out of his office with a number of carefully selected documents which, having once obtained the protection of the Canadian Government, he then handed over to the police, an event which led to twenty persons being charged or brought to trial of whom nine were convicted[3]; in the United States sentence of death has been passed[4] for anticipating the unlikely official release of atomic secrets; in France, Greece,

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[1] Nunn May in 1946, Fuchs in 1950 and Marshall in 1952.

[2] Burgess, Maclean and Pontecorvo.

[3] Nine cases were reported—*R.* v. *Woikin* [1946] 1 C.R. 224; *R.* v. *Adams* [1946] O.R. 506; *R.* v. *Rose* [1946] C.R. 107; *R.* v. *Mazerall* [1946] O.R. 511; *R.* v. *Harris* [1947] O.R. 461; *R.* v. *Smith* [1947] O.R. 378; *R.* v. *Benning* [1947] O.R. 362; *R.* v. *Gerson* [1947] O.R. 715; *R.* v. *Lunan* [1947] O.R. 201. It also resulted indirectly in the arrest in England of Dr. Nunn May.

[4] On Julius and Ethel Rosenberg.

Sweden, Spain and Yugoslavia alone, charges of espionage have been brought in recent months.[5] Different aspects of the same problem can be seen in the American 'loyalty programmes', in 'McCarthyism' and the Congressional Committee for un-American Activities, in the British Civil Service purge, in the Suppression of Communism Act in South Africa, the Italian Anti-Fascist Bill or in the attempted introduction last year of sweeping measures to combat Communism in Australia. Books on traitors are in vogue,[6] whilst in America, ex-Communists, committing a form of double treachery, have turned a shameful past to good advantage by writing, lecturing and testifying about the activities of their former fellow-sympathisers. With democracies endangering, in the interests of security, that freedom of thought and expression which distinguishes them from totalitarian states, the whole field of subversive activity, of which espionage is an important element, presents a tragically current problem.

It is not within the scope of this paper either to analyse causes and suggest remedies or to debate the rights and wrongs of individual action dictated by conscience. It is intended rather to examine that degree of protection which the law affords us in this country in time of peace against the dangers of espionage, to discuss some of the problems involved and the extent to which executive powers have been misused in the past, and finally, to assess briefly the sufficiency of this protection by way of comparison with the United States. The field is wide and only some of the more important problems can be approached.

I. ESPIONAGE AND TREASON

Two immediate difficulties must be faced:

(1) 'Espionage', is a composite term which lacks an authoritative legal definition. To read of it in the American *Corpus Juris Secundum* as 'the practice of spying or secretly watching for the purpose of detecting wrongdoing; excessive or offensive surveillance' is of little use and probably misleading, and it is proposed, therefore, to interpret it for the purposes of this paper as 'the unauthorised obtaining for, or communication to, a

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[5] This paper was read on November 13, 1952.

[6] *E.g.*, recent works by Miss Elizabeth Bowen, Mr. Nigel Balchin, Miss Rebecca West, Mr. Alistair Cooke, and Mr. Alan Moorehead.

foreign power of confidential information relating to national security', a description which substantially fits that generally adopted by both layman and lawyer.

(2) Whether Britain can be said to be at peace to-day in view of the present world situation.

The legal importance of the distinction in this context lies in the possible application to acts of espionage of the law relating to treason, and in April, 1951, the Minister of Defence, stated[7] that 'it seems likely from a legal point of view that the state of hostilities between China and ourselves is sufficient to bring the act of "giving aid and comfort" to the Chinese within the definition of treason' an offence which would obviously be highly relevant to the communication of security information. In the same month, this view which had already[8] been put forward by Sir Hartley Shawcross, then Attorney-General, was successfully invoked, analogously, in a sedition charge in Australia. On the other hand, in the recent Australian Communist Party Dissolution Case,[9] each of the majority judges expressly refused to sanction the use of war-time powers by the executive, a decision which effectively invalidated the enactment in question.[10]

Whatever the exact definition of the present *status quo,* it is submitted that the law relating to treason might be successfully applied to-day to certain acts of espionage. One form,[11] that of 'adhering to the king's enemies in his realm, giving them aid and comfort in his realm or elsewhere', signifies an adherence 'to all the subjects of any State which is carrying on belligerent operations against the king whether or not war has been solemnly declared',[12] a statement which finds support in Hale[13] and

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[7] In a letter printed in *The Times* newspaper, April 13, 1951.

[8] *The Times* newspaper, September 20, 1950.

[9] (1951) 83 C.L.R. 1.

[10] This problem of defining the present situation is more fully discussed in (1951), *International Law Quarterly,* at p. 462, 'The Nature of the "War" in Korea' by L. C. Green and has recently been the subject of a statement by the Foreign Secretary on June 11, 1952 to the effect that 'we are not engaged in a war with the Republic of North Korea because we do not admit that there is such a State. . . . What we are engaged on is an action of the United Nations' forces in lawfully resisting aggression under the United Nations' Charter'.

[11] As set out in Hale, 1 P.C. 82.

[12] *Russell on Crime* (10th ed.), at p. 315.

[13] 1 Hale P.C., at p. 162, '. . . if *de facto* there be a war between princes, they and their subjects are in a state of hostility and they are in the condition of enemies (*hostes*) to each other'.

East[14]; another, that of 'compassing the death of the King, Queen or heir'[15] includes 'the collecting of information for the use of the king's enemies, though it never be actually sent to them',[16] the definition of 'enemies' being, it would seem, as in the fourth form, 'true public belligerents'.

In view of the severe penalty, even on the lesser charge of treason-felony, and the fact that, as will be seen, espionage is already fully dealt with in English law, it is probable that the offence of treason would not be invoked to-day in this context. Although it would be a digression to discuss constructive treason, treason-felonies, or the recent debatable[17] extension effected by the House of Lords in *Joyce* v. *The Director of Public Prosecutions,*[18] it is as well to bear these in mind in appreciating that, quite apart from such vague common law offences as conspiracy and public mischief, and the relevant provisions of the Atomic Energy Act, 1946,[19] the Official Secrets Acts, although the most important, do not constitute the only source of executive powers in questions of peace-time espionage.

2. LEGISLATION AND ESPIONAGE

The problem underlying all criminal legislation, especially that involving offences against the State, is one of reconciling national security with personal freedom, the dilemma which faced Lincoln nearly a century ago, whether a government must of necessity be too strong for the liberties of its people or too weak to maintain its own existence.

In England the principal safeguard for the protection of individual rights and liberties has always rested in the reluctance of the legislature to confer wide powers upon the executive especially in time of peace, but it was inevitable in this case, that Parliament, in legislating to meet dangers which by their very nature required strong measures, should have allowed the executive to encroach upon the field of personal liberties. It is questionable, however, whether the legislature has not allowed the executive to encroach too far and whether the powers conferred have not sometimes been misused by past governments.

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[14] 1 East P.C., at p. 77: 'By the term enemy is always to be understood a foreign power owing no allegiance to the Crown and in a state of open hostility with us; though perhaps war may not have been regularly declared between the respective countries. . . .'.

[15] As set out in Hale, 1 P.C. 82.

[16] Kenny's *Outlines of Criminal Law* (16th ed.), at p. 313.

[17] *Viz.,* Glanville L. Williams, *The Correlation of Allegiance and Protection* (1948), 10 *Cambridge Law Journal.*

[18] [1946] A.C. 347.

[19] Infra.

The first Official Secrets Act,[20] which was passed in 1889, is today only of historical interest. It was an awkward and unwieldy enactment, designed partly to punish such a breach of official duty as had occurred in 1878 when a copyist in a public office betrayed to the newspapers the contents of the secret clauses of the Anglo-Russian Agreement. With regard to espionage, section 1 (1) of the Act, dealing with the wrongful obtaining of information, did not require the accused's purpose to be prejudicial to the State, though if it were to communicate to an enemy, he was guilty of a severer offence and liable to penal servitude for life.

The principal Official Secrets Act,[21] which re-enacted and drastically amended that of 1889, was passed in 1911, the year of the Agadir crisis, after considerable opposition in the Commons. It is this enactment, coupled with important amendments in 1920,[22] which contains the source of most of the Government's powers to deal with subversive activity in peacetime. Before examining in detail any of the controversial sections, mention of several of the provisions will give some idea of the general effect of the Act.

It is a felony for any person with purpose prejudicial to the safety of the State to approach any place prohibited in the Act or to make any sketches, to obtain or communicate any information which might be useful to an enemy.[23] It is a misdemeanour to receive, retain or part carelessly with certain types of information.[24] It is illegal to harbour spies,[25] to obstruct or interfere with police officers or sentries in the vicinity of any prohibited place[26] or, with intent to obtain access to such a place, to make false statements, forge passports, official permits or passes or to pose as a Government employee.[27] Provision is made for the interception of telegrams[28] and for the control of persons who,

[20] 52 & 53 Vict., c. 52.
[21] 1 & 2 Geo. 5, c. 28.
[22] 10 & 11 Geo. 5, c. 75.
[23] Section 1, O.S.A. (1911).
[24] Section 2, O.S.A. (1911).
[25] Section 7, O.S.A. (1911).
[26] Section 3, O.S.A. (1920).
[27] Section 1, O.S.A. (1920).
[28] Section 4, O.S.A. (1920).

for consideration, receive and forward letters, telegrams or postal packets to others,[29] whilst extensive powers of arrest,[30] search[31] and interrogation[32] are conferred.

Criticism of the two statutes has centred on certain sections which were said to be either unwarrantably harsh, throwing too heavy a burden on the accused, or liable to be employed for ends other than those of suppressing such offences as espionage, to combat which was the professed aim of both pre- and post-war governments in drafting the enactments. In the House of Commons, Magna Charta was invoked amidst denunciation of the 'stranglehold of bureaucracy'[33] and *The Times* called despairingly upon Milton to witness the alleged restrictions imposed upon the Press.[34] The curious feature however about the responsible criticism in 1920 is that most of it turned, quite unjustifiably upon the interpretation of section 1 (2) which was misconstrued by most opponents of the Bill, particularly in three leading articles in *The Times*,[35] whilst a far more dangerous section, section 6, passed largely without comment. In fact the attack on the freedom of the Press which was feared specifically from section 1 (2) has not been forthcoming from that quarter, whereas section 6, read in conjunction with section 2 of the 1911 Act, has proved a means of stifling legitimate discussion and criticism, not merely by the Press, but by the public in general.

One section which, it is suggested, has been rightly criticised, is section 1 of the 1911 Act. Creating the most serious offence in either statute, this provides that any person who, for any purpose prejudicial to the safety or interests of the State approaches any prohibited place, or makes any sketch or plan, or obtains or communicates any information which might be useful to any enemy, shall be guilty of a felony. Subsection (2) states that, on a prosecution under this section, it shall not be necessary to prove that the accused was guilty of any particular act tending to show a prejudicial purpose, and it will be sufficient if this should appear from the circumstances of the case or the known character of the accused. Furthermore, any information relating to a prohibited place, obtained or communicated by any unauthorised person shall be deemed to have been obtained for a prejudicial purpose unless the contrary be proved.

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[29] Section 5, O.S.A. (1920).
[30] Section 6, O.S.A. (1911).
[31] Section 9, O.S.A. (1911).
[32] Section 6, O.S.A. (1920).
[33] *Hansard* (1920), at p. 1546.
[34] *The Times* newspaper, June 26, 1920.
[35] *The Times* newspaper, June 26, June 30, November 30, 1920.

The section thus places on the accused the burden of proving himself innocent and, by analogy with the procedure adopted in the crime of receiving, and a few minor statutory offences, it permits the prosecution to introduce evidence of the accused's past character, even though the offence prima facie does not come within the terms of any of the procedural exceptions which admit such evidence in criminal cases.[36]

Unfortunately, this section has been even further strengthened by section 2 (1) of the 1920 Act which, by extremely inept wording, has provided that communication or attempted communication with a foreign agent shall be evidence in proceedings under section 1 of the 1911 Act, not merely of a prejudicial purpose, but of the actual obtaining or attempted obtaining of information which might be directly or indirectly useful to an enemy. Coupled with the wide official interpretation given to 'foreign agent',[37] 'communication'[38] and 'enemy',[39] this remarkable piece of legislation has, in law, left little for the prosecution to prove—the *actus reus* of obtaining useful information may be evidenced by attempted communication with a person 'reasonably' suspected of being a foreign agent and the *mens rea* provided by statements of the accused's past behaviour and character.

In view perhaps of the need for trial by jury and the public outcry which would inevitably ensue, no Government has sought a conviction on such meagre evidence as this, but it is a most unfortunate piece of legislation which, in extreme cases, would leave personal liberty dependent solely on these safeguards.

Nor are these the only sections of the two statutes which are either too harsh or too wide in their possible application. Section 2 (1) of the 1911 Act, dealing with the wrongful communication or retention of certain types of information, contains several important different substantive offences, among them the communication by a person holding office under the Crown of information received in his official capacity. Moreover receipt

[36] Kenny's *Outlines of Criminal Law* (16th ed.), pp. 552–558.
[37] Section 2 (2) (*b*), O.S.A. (1920).
[38] Section 2 (2) (*a*), O.S.A. (1920).
[39] *R.* v. *Parrott* (1913) 8 Cr.App.R. 186.

of information 'reasonably' believed to have been communicated in contravention of the Act is, by section 2 (2), a misdemeanour unless the accused can prove it to have been against his will, and there is no need for the prosecution to establish even the requirement of a prejudicial purpose.[40]

It is this section, usually coupled with section 6 of the 1920 Act, which the Government was forced to amend in 1939[41] and which renders any refusal to comply with police interrogation a misdemeanour, which is most open to abuse. Whereas the proposers of both enactments repeatedly emphasised that the measures were necessary in the interests of internal security for dealing with the growing menace of espionage, section 2 of the 1911 Act has on occasions been employed against the spirit of the statute to stifle legitimate discussion of matters inimical to the Government of the day, regardless of the distinction to be drawn between national security and governmental inviolability. It was clearly never the intention of the legislature, in conceding wide powers of search and interrogation and employing presumptions which have no rightful place in our legal system, to render the Government immune from criticism and to stifle indiscriminately intelligent discussion which might have been indirectly provoked through minor official disclosures.

Several instances may be cited to show how widely and unfairly these provisions can be, and have been, applied: in March, 1934, Mr. Edgar Lansbury, who had recently published a biography of his distinguished father, Mr. George Lansbury, was found guilty of receiving information contained in Cabinet memoranda, though no proceedings were instituted against Mr. George Lansbury himself, then a leading member of the House of Commons, and presumably equally guilty in law and even more so in fact[42]; in December, 1932, Sir Compton Mackenzie, having written on his experiences as an Intelligence Officer in Greece in 1916, was heavily fined for drawing on information acquired when serving in H.M. Forces[43]; in the same year, a temporary clerk at Somerset House prematurely divulged the contents of certain wills to a reporter and both were severely dealt with, though the event could hardly have endangered national security[44]; in 1935 the sale at Sotheby's of a collection of letters from the first Duke of Wellington to the British Ambassador in Paris was stopped by the Foreign Office as likely to divulge official secrets[45]; in 1930 when three newspapers printed statements suggesting that the Government of India was contemplating the arrest of Mahatma Gandhi, the editors were interrogated under section 6 of the 1920 Act as to their source of information. The news ultimately turned out to be an accurate piece of intelligent anticipation; in 1936 responsible Members of Parliament were pressing for the Official Secrets Acts to be employed against persons involved in the Budget Leakage, and in 1938 a journalist was successfully prosecuted for refusing to divulge the source of his information when his paper printed warnings of the presence in the neighbourhood of a certain swindler, giving particulars which had been circularised exclusively among the local police[46]; similarly in 1931 the Attorney-General was in one week asked in Parliament to institute proceedings against both the *Daily Herald* and the *Northern Echo* for the premature publication of unimportant information,[47] whilst in the columns of *The Times* recently[48] the Official Secrets Acts were mentioned as being of possible application to former Ministers guilty of discussing Cabinet matters in the course of parliamentary proceedings; most important of all, in the period between the wars, the present Prime Minister and Minister of Supply, in addition to a recent Chancellor of the Exchequer[49] were all threatened at different times with the Official Secrets Acts in order to stifle legitimate and vital criticism of Governmental mismanagement which had come to their attention through official sources. The late Professor

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[40] As an illustration of the ambiguous wording of the Acts, the late Sir Stafford Cripps in the Parliamentary debate on June 12, 1936, on the Budget leakage was of opinion that liability under section 2 (2) extended to cases in which the communication was negligent and not deliberate but was known by the receiver to be of prohibited information. The Attorney-General, Sir Donald (now Lord Justice) Somervell, had stated that a conviction under section 2 (2) depended in fact on the possibility of convicting another person under section 2 (1).

[41] 2 & 3 Geo. 6, c. 121.

[42] *The Times* newspaper, March 21, 1934.

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[43] *The Times* newspaper, December 15, 1932.

[44] *The Times* newspaper, June 24, July 14, August 12, 1932.

[45] *The Times* newspaper, July 4, 1935.

[46] *Lewis* v. *Cattle* [1938] 2 K.B. 454.

[47] *The Times* newspaper, May 15, May 19, 1931.

[48] This correspondence which began on August 8, 1952, seems to have overlooked the inherent possibility of a clash between the Courts and Parliament, reminiscent of *R.* v. *Graham-Campbell, ex p. Herbert* [1935] 1 K.B. 594 and of the Duncan Sandys case in 1938.

[49] The Rt. Hon. Hugh Dalton.

Harold Laski wrote at the time: 'The actions of the Government are more consistent with the habits of an autocratic, than of a democratic, State. For the former refuses the right of independent criticism—above all, of criticism from its elected legislature—to enquire into its habits. A democratic State builds the right of its Government to rule upon its ability to emerge from such independent criticism with a clean bill of health. . . . Once the executive is entitled to limit that right, the position of a free Parliament in a free State is gravely jeopardised'.[50]

Before leaving the Official Secrets Acts, mention should be made of some of the other more debatable sections: section 7 of the 1920 Act contains a provision that any person doing any act preparatory to the commission of an offence under either Act shall be criminally liable, a form of offence expressly criticised by the present Lord Chief Justice in the Divisional Court only this year[51]; section 5 of the same Act, concerning the regulation of forwarding agencies, has been employed to punish a turf adviser who, for racing purposes, adopted a professional instead of his proper name when using an accommodation address, a far cry from any form of espionage activity[52]; and the powers of arrest and delegated right to issue search warrants in sections 6 and 9 respectively of the 1911 Act are both unduly wide in their possible application.

Although action is undoubtedly needed to deal with persons guilty of betraying official confidences, it need not be taken by way of the Official Secrets Acts, which, conferring extensive powers and employing dangerous presumptions, were designed to meet an altogether greater need, directly affecting the safety of the nation. In purporting to deal with problems of espionage, Parliament in 1911 and 1920 provided future governments with a means of suppressing independent criticism and of employing measures of a dangerous and repressive character to deal with matters of a comparatively trifling importance. Despite such instances of governmental misuse, it is probably true that to-day, after this unfortunate period of literal interpretation in the

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[50] *The Tribune*, July 8, 1938.

[51] *Gardner* v. *Ackeroyd* [1952] 2 All E.R. 306.

[52] *The Times* newspaper, July 12, 1938.

1930s, the measures concerned have generally[53] been rightly and restrictively employed for the purposes intended and, with the amendment imposed on section 6 of the 1920 Act in 1939, recent governments have appreciated, in the words of a former Attorney-General and Lord Chancellor, that the powers conferred by the Official Secrets Acts 'must only be resorted to on exceptional occasions'.[54]

In addition to the wide terms of these enactments, the executive in peace-time can employ other measures to suppress forms of espionage. Thus section 11 of the Atomic Energy Act, 1946,[55] which inevitably restricts freedom of discussion among atomic scientists, prohibits communication to any unauthorised person without the consent of the Minister of much information relating to atomic energy and might well have been employed in the case of Fuchs. The terms of the section, which contain no requirement of *mens rea,* are however primarily designed to meet a different danger, that of innocently divulging such information an offence of far less gravity than espionage.

Equally, the two adaptable common law offences of public mischief and conspiracy can probably both be employed to the same ends, when necessary, but in view of the severity of a charge of espionage and the comprehensive scope of the Official Secrets Acts, it is clearly unlikely that any law, other than that contained in the 1911 and 1920 statutes will ever be applied to subversive activities in peace-time.

3. JURISDICTIONAL PROBLEMS

An important and rather more general problem arising out of the law dealing with espionage offences and one which, in a different context, has frequently recurred, is that of the scope of the criminal jurisdiction of the courts.

With regard to British nationals and resident aliens possessing no special status, the criminal law is clearly applicable, but where such a person has been charged under the Official Secrets Acts with the unauthorised communication of certain types of information, it invariably appears, as in the recent Marshall case,[56] that he has been in touch with the agent of a foreign power. There is no difficulty if the agent does not possess official status and is acting as a spy, for his own Government cannot confess to having commissioned him in this capacity. The problem lies rather in determining the course to take against a diplomatic envoy or members of his staff indulging in espionage activity.

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[53] Although in November, 1952, a reporter was charged under section 4, O.S.A. (1911) (and subsequently acquitted) for seeking to obtain information from a prison officer as to the whereabouts and treatment etc. of Dr. Nunn May.

[54] Sir William (now Viscount) Jowitt, reported in *The Times* newspaper, May 15, 1931.

[55] 9 & 10 Geo. 6, c. 80.

It is still uncertain whether foreign diplomats are entitled to exemption from the jurisdiction of the criminal courts. Although the present editor of *Oppenheim* has stated 'that the theory and practice of international law agree nowadays that the receiving states have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys',[57] it is respectfully submitted that this view is too categorical. Halsbury's *Laws of England*[58] state that the alleged exemption is not evidenced in any reported decision of the English courts, and although this, in turn, has been attacked in the past,[59] an examination of the recent report on Diplomatic and State Immunity by an Interdepartmental Committee,[60] reveals that, however desirable such immunity from criminal process might be in the opinion of the committee, there has in fact been no case in English municipal law in which it has been approved.[61]

Hitherto, the sanctions adopted against foreign diplomats for criminal offences have undoubtedly been of a political rather than a legal character. Thus in 1584 the Spanish Ambassador was ordered to leave the country, whilst in 1587 the French Ambassador was merely reprimanded and warned not to conspire again against the life of the Queen.[62] In 1675, on the

[56] *The Times* newspaper, July 3, 1952. With regard to the *Marshall* case, it would be interesting to know why those statements of Kuznetzov, the member of the Soviet legation (who was not subpoened), which were used by the prosecution to question the truth of Marshall's evidence, were not excluded on grounds of hearsay.

[57] Oppenheim's *International Law* (7th ed.), at p. 708.

[58] (2nd ed.), Vol. 6, at p. 507.

[59] E.g., *The Collected Papers of Sir Cecil J. B. Hurst* (1950), at p. 225, citing *R.* v. *Guerchy,* 1 W. Blackstone 545.

[60] Published in July, 1951.

[61] See also D. C. Holland, *Diplomatic Immunity in English Law,* 4 *Current Legal Problems* (1951), at p. 81. The most relevant recent case is *R.* v. *Kent* [1941] 1 K.B. 454, in which any possible immunity conferred upon a member of the American Embassy was waived by his Ambassador, and Lord Caldecote, C.J., expressly refused to discuss the contingency.

[62] Other cases may be found in Satow's *Diplomatic Practice* (1922); *e.g.,* Le Bas (1654), Bruneau (1605), Gyllenborg (1716).

other hand, Wicquefort, the Minister President of the Duke of Luneburg at The Hague, was arrested and condemned to life imprisonment with confiscation of property for communicating official secrets.[63] This is just one illustration that the exemption allegedly conferred by the theory and practice of international law may be deferred in extreme circumstances, for although the liberty necessary for the execution of diplomatic missions demands immunity from criminal jurisdiction and is accorded by most governments on the basis of reciprocity this cannot, it is submitted, deprive a State of the right to adopt any measure essential to its safety.[64] In the Canadian cases which followed the Gouzenko disclosures there is more than a hint of a realistic approach to the problem, especially in the judgment of Bissonnette, J., in *R.* v. *Rose*[65] as the following extract indicates: 'Before granting or recognising a privilege to another State, a State has the right to accord to itself a first privilege, that of its own security. To decide otherwise would be to grant a so-called international rule an authority superior to the strict, rigid and necessary rule that the State, first and foremost, owes it to its own citizens, independently of its foreign duties, to assure its own security . . .'.[66] Moreover the view has been advanced[67] that these cases, involving the participation of Soviet Embassy officials, might legitimately have led to a charge being brought against Russia of having committed an international delict, for which reparation could have been demanded.

R. v. *Rose* is an interesting case in many respects. In his judgment Bissonnette, J., talks of 'a sort of tacit renunciation of the privilege of inviolability'[68] occurring when an envoy emperils the safety of the State to which he is accredited, a dangerously convenient and adaptable theory. Moreover, with regard to those Embassy documents which were cited before the Court during the prosecution of a Canadian citizen, he propounds the argument that the moment the Government was placed in possession of them and decided to keep them, 'they were seized in the legal sense of international law and that, by the exercise of its sovereignty, the Canadian State made these documents fall into its heritage, so that from that time they were no longer the property of the Russian Ambassador or his Government but the property of the Canadian Government'.[69] Whilst there may be sound reason for his proposition that diplomatic immunity is relative and that a Canadian citizen cannot take advantage of rights accorded to a foreign State, it is quite a different matter to suggest that a government is in such circumstances legally entitled to confiscate the property of a foreign Embassy, even on the tenuous ground of Act of State, or to maintain that, if the Canadian Government decided to keep the papers and not return them, it could do so since they did not constitute diplomatic documents. However debatable may be the authority of the learned judge's statements, *R.* v. *Rose* is an indication of the uncompromising approach, divorced from theoretical claims for international rights, which the courts may be forced to follow when dealing with matters directly affecting State security.

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[63] Bynkershoek confines the application of this case by the argument that Wicquefort was still a Dutch national and in the paid service of the States-General when he became the Duke's Minister.

[64] Cf. P. E. Corbett, *Law and Society in the relation of States* (1951).

[65] [1947] 3 D.L.R. 618.

[66] [1947] 3 D.L.R., at p. 646.

[67] By Maxwell Cohn, *Espionage and Immunity* (1948), *British Year Book of International Law,* at p. 408.

[68] [1947] 3 D.L.R., at p. 644.

A similar problem concerning the extent of the immunity accorded to members of international organisations, arose in 1949 when a Soviet engineer and architect, employed by the Headquarters Planning Staff of the secretariat of the United Nations, was indicted with Judith Coplon[70] on charges of violating the American espionage laws. The Court held first, that he was not entitled to diplomatic immunity as an emissary of the U.S.S.R.; secondly, even assuming that Article 105 of the United Nations Charter was self-executing, so that officials of the organisation should enjoy such privileges and immunities as were necessary for the independent exercise of their functions, espionage did not fall within the scope of their recognised activities, nor could the International Organisational Immunities Act, as applied to a United Nations official, be invoked for the same reasons.[71]

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[69] [1947] 3 D.L.R., at p. 647.

[70] *U.S.* v. *Coplon* (1949) 84 F.Supp. 472 (S.D. N.Y.).

[71] Although the case appeared before Judge Rifkind on May 10, 1949, *The Times* newspaper of March 7, 1949, states that the Secretary-General of the United Nations, Mr. Trygve Lie immediately suspended Gubitchev and waived his diplomatic immunity. The judgment, therefore, though apparently sound and logical, and in the reports, containing no mention of waiver, would not appear to be conclusive.

4. ADMINISTRATIVE ACTION AND THE LAW

Another and completely distinct aspect of the protective measures dealing with espionage in peace-time is to be found in the action taken by the Government to deny access to confidential information to those in its employ who might, due to conflicting loyalties, be tempted to divulge official secrets. Under pressure from abroad and appreciating a danger which, in this country alone, Fuchs, Nunn May and, to a lesser degree, Marshall have shown to exist, the executive introduced in 1948 into the Civil Service a procedure which, in certain respects, fails to conform to recognised judicial standards, and might leave a person dismissed on political grounds entirely without legal redress.

In England, control of the Civil Service is, of course, vested in the Crown, which may, it has been alleged,[72] subject only to statutory provisions, dismiss its servants at will, whatever the nature of the contract and the grounds of its decision, its right to act in such a manner being implied in each contract.[73] In fact, the true position is far more uncertain for, if the foundation of the Crown's right lies in an implied term or fixed custom, it is nevertheless an accepted principle that an implied term cannot stand in face of an express provision, a view approved in this context by Lord Atkin in 1934[74] and followed in 1949 by Mr. Justice (now Lord Justice) Denning.[75] On the other hand if, as is sometimes stated, the implied term is itself grounded on public policy, can it be said that this can be excluded in law by an express provision?

The cases themselves yield little or no binding authority. Despite the view generally taken of *Dunn* v. *The Queen*,[76] and the statement by Lord Esher, M.R., that the Crown could not exclude its power to dismiss even by express stipulation, the position is still not clear in view of the actual *ratio decidendi*, although there have indeed been strong obiter dicta in subsequent cases[77] in support of the Master of the Rolls. The contrary view of Lord Atkin is, however, itself only an obiter dictum in the Privy Council and is based on a case which is governed by statutory provision.

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[72] Wade and Phillips, *Constitutional Law* (4th ed.), pp. 310, 311.

[73] *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227, at p. 231.

[74] *Reilly* v. *R.* [1934] A.C. 176, at p. 179.

[75] *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.

[76] [1896] 1 Q.B. 116.

[77] *E.g., Hales* v. *R.* (1918) 34 T.L.R. 589; *Denning* v. *Secretary of State for India* (1920) 37 T.L.R. 138.

The most satisfactory answer lies perhaps in the views of Professor Glanville Williams[78]: once it is appreciated that the alleged limitation placed on the Crown's contractual capacity is not in fact in the public interest and sustainable on those grounds, and that the restriction is unnecessary and can be put to dangerous uses, particularly in relation to government officers acting on quasi-judicial tribunals, then in view of the lack of binding authority, there would seem to be nothing to prevent the courts from protecting a civil servant employed for a fixed term who is dismissed for political reasons without due compensation.

However great the need for security measures to-day, there are several features of the purge procedure which are open to criticism: there can be no legal or trade union representation before the appeal tribunal and invariably no specific allegations have been made for the civil servant to answer; the source of the information is not divulged to him and he is denied the right to cross-examine his accuser; although the security check is officially designed to cover only those in particular 'sensitive' branches of the Civil Service, whole Ministries have, it would seem, been unnecessarily designated as secret establishments for this purpose; despite the policy of the Government to transfer rather than dismiss suspect employees, persons with particular qualifications inevitably suffer unfairly, in proportion to their specialised skill and, finally, it is most unfortunate that judicial review, by way of certiorari is not applicable to the proceedings of these quasi-judicial tribunals.[78a]

It is perhaps true that, despite these imperfections and some unfortunate decisions,[79] this repressive procedure, limited to certain fields and administered by impartial officials, is at present rather more defective in theory than practice. In particular it contrasts favourably with the current 'loyalty programmes' of other countries, in which guilt by association is sometimes presumed on the strength of anonymous information not evaluated by court or jury in matters which can have little or no bearing on national security.[80]

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[78] *Crown Proceedings* (1948), pp. 62–68.

[78a] This position at law has recently been affirmed in a decision of the Divisional Court in *R.* v. *National Joint Council for the Craft of Dental Technicians* (*Disputes Committee*) [1953] 2 W.L.R. 342.

[79] These are fully set out in *The Civil Service Purge*, issued by the Civil Service Political Freedom Committee.

5. AMERICAN LAW AND SUBVERSIVE ACTIVITY

It is impossible to generalise about foreign espionage legislation for, dependent on its traditions of law and order and the character of its people, and in proportion to the likelihood and degree of the dangers involved, each country differs from its neighbour in the nature of the security measures it adopts in peace-time. In France, for instance, espionage may, in certain circumstances, be a civil or a military offence. In Sweden the penalty for *gross* espionage may be life imprisonment, whereas in Yugoslavia and Greece where the danger to-day is more imminent and overwhelming, death sentences are imposed with considerable liberality for subversive activity.

Although detailed examination is outside the range of this paper, it is perfectly clear from the briefest survey that the steps taken in America to combat disloyalty are of a most interesting and, in many respects, frightening character, for apart from both Federal and State legislation dealing with espionage and kindred offences, the restrictions on freedom of thought and association, which have been imposed within a limited field in England by administrative action, are to-day of far wider and more frequent application in the United States. The powers conferred by the legislature are, of course, subject to review by the Supreme Court, and Lord Radcliffe has stated that 'it is likely to be a pretty abstruse question whether a particular statute violates or complies with the Constitution: it will have to be taken to the Supreme Court to be decided. But its decision closes the matter and in that sense its judges are the final arbiters of what law may be passed in America to deal with many of its most critical affairs'.[81]

Despite the efforts of Mr. Justices Black and Douglas, it is undoubtedly true that the liberal standards of the Roosevelt Supreme Courts of such men as Brandeis and Cardozo, or of

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[80] In 51 *Columbia Law Review*, Professor Bontecov appraises the English approach as one 'based on faith in the strength of democracies rather than on fear of the threat of Communism', a view which has been supported in recent dissenting judgments of the United States Supreme Court.

[81] *The Problem of Power* (1951), at p. 62.

Routledge and Hughes are now of the past. Unfettered by the strict doctrine of precedent as applied in our courts—Emerson's 'foolish consistency, the hobgoblin of little minds, adored by little statesmen, philosophers and divines'—the present Supreme Court, called upon to interpret the rights of the executive in a period of considerable internal tension, has been inclined to subordinate some of the constitutional guarantees of freedom of thought and expression to the supposed interests of national security. To cite but three of many examples, the political rights of civil servants have recently been drastically curtailed,[82] the non-Communist affidavit section of the Taft-Hartley Act[83] sustained[84] and the Smith Act,[85] which comes near to outlawing Communism, has been upheld in the New York trials of 1950.[86] Moreover the 'clear and present danger' rule, first propounded by Mr. Justice Holmes in 1919[87] and regularly adopted by the courts, during the last decade at least, to determine the legality of alleged restrictions on freedom of expression, has of late[88] been judicially reinterpreted with a convenient emphasis on the gravity, rather than the imminence, of the evil apprehended, a decision which has been welcomed by a learned American writer as 'a declaration of independence by the Court from the tyranny of a phrase'.[89] It would, by way of contrast, be as well to remember the words of the late Mr. Justice Brandeis, not merely with reference to this specific rule but in relation to the whole tenor of recent American policy in this field: 'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom'.[90]

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[82] *United Public Workers* v. *Mitchell* (1947) 330 U.S. 75.

[83] 61 Stat. 136; (1947) Supp. 1949.

[84] *American Communications Association* v. *Douds* (1950) 339 U.S. 382.

[85] (1948) 18 U.S.C. 2385.

[86] *Dennis* v. *U.S.* (1950) 339 U.S. 162; *U.S.* v. *Fleischman* (1950) 339 U.S. 349; *U.S.* v. *Bryan* (1950) 339 U.S. 323.

[87] *Schenk* v. *U.S.* (1919) 249 U.S. 47.

[88] *Dennis* v. *U.S.* (1950) 339 U.S. 162.

[89] Edwin S. Corwin, *Bowing out Clear and Present Danger, The Notre-Dame Lawyer* (Spring, 1952).

The Official Secrets Acts have their equivalent in the United States in the 1917[91] and 1940[92] Espionage Laws, which contain very similar provisions but are subject to a period of limitation, a fact which was of considerable importance in connection with Alger Hiss. Disclosures of atomic secrets, on the other hand, are rather more severely penalised in America[93] than in this country. But these laws have been drastically supplemented in recent years, not merely by minor statutes prohibiting criminal syndicalism and by purge procedures applying to federal employees[94] or 'public' school teachers[95] but by such legislation as the 1950 (McCarran) Internal Security Act, which, passed over the presidential veto, contains measures of a dangerously sweeping character. This statute seeks, *inter alia,* to punish Communist-front and -action organisations[96] and force disclosure of their membership[97]; to prevent employment of possibly subversive persons in many positions[98] to render more comprehensive and stringent existing sedition[99] and espionage laws; to forestall any influx of dissident elements from abroad by a more rigorous screening of aliens seeking admission or naturalisation[1] and to confine potential spies and saboteurs in time of emergency.[2] Section 4 (*c*), for instance, virtually adopts the controversial and adaptable second section of the English 1911 Act. 'Section 4 (*a*), literally interpreted, prohibits the making of a speech, the printing and distributing of a newspaper, the arranging or conducting of a public assembly, the contributing of funds to organisations or the free exercise of the nomination and election processes, where such action would contribute to the establishment of a totalitarian dictatorship'.[3] Sections 22–30 contain important amendments to the immigration and naturalisation laws, and the State Department has estimated that at least 90 per cent of the present German population has now become ineligible for admission. In 1951, the Department of Justice revealed that it had a list of 14,000 persons who would be taken into custody in a state of emergency under the powers conferred by Title 2 of the Act, and it is accepted that there are over 54,000 persons on the F.B.I. files against whom such action might be taken.[4]

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[90] *Whitney* v. *California* (1927) 274 U.S. 357, at p. 377.

[91] June 15, 1917, 40 Stat.

[92] October 17, 1940, 50 U.S.C.

[93] Title 42, U.S. Code (1946).

[94] Hatch Act (1940), 53 Stat. 1148, and see *United Public Workers* v. *Mitchell* (1947) 330 U.S. 75.

[95] *E.g.*, The (New York) Feinberg Law (Laws 1949, c. 360), upheld in N.Y. Court of Appeals (301, N.Y. 476). See further, James Marshall, *The Defence of Public Education from Subversion,* (1951) *Columbia Law Review,* p. 587.

[96] Section 15 (*a*) (1) (2).

[97] Section 7 (*a*) (*b*).

[98] Section 5 (*a*) (1) (A) (B).

[99] Section 4 (*a*).

[1] Sections 22–30.

[2] Title 2.

The restrictions imposed within the Civil Service in England by administrative action have been effected in wider fields in America in more drastic form. Thus section 9 of the Hatch Act, 1940, has been strongly criticised recently by Mr. Justice Black: 'In view of these prohibitions, it is little consolation to (federal) employees that the Act contradictorily says that they may express their opinions on all political subjects and candidates. The result is that the sum of political privilege left to Government and State employees and their families to take part in political campaigns seems to be this: they may vote in silence; they may carefully and quietly express a political view at their peril; and they may become "spectators" at campaign gatherings though it may be highly dangerous for them to second a motion or let it be known that they agree or disagree with a speaker'.[5] In *Bailey* v. *Richardson*,[6] for instance, in which the dismissal of a federal employee was upheld, it transpired that the Loyalty Review Board did not know the source of the Government's information or whether the statements in the F.B.I. files had been sworn to or not. It thus could not evaluate its reliability and it was admitted that some of the F.B.I.'s own submissions were based not on knowledge but on belief. No charges were served on Miss Bailey and she had no right to subpoena witnesses.

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[3] (1951), *Columbia Law Review,* at p. 627.

[4] The language of the Act is apparently wide enough to permit 'the institution of a preventive detention program in the event of a minor invasion of some remote American possession or the extension of such a program long after actual warfare has ceased' (1951), *Columbia Law Review,* at p. 652.

[5] *United Public Workers* v. *Mitchell* (1947) 330 U.S. 75.

[6] (1950) 339 U.S. 977.

The powers of the House Committee on un-American Activities and of such State imitations as the Tenney Committee in California, the Canwell Committee in Washington and the Broyles Commission in Illinois are extremely wide, and the Supreme Court has ruled that Congress may investigate Communism or membership in subversive organisations as an aid to the legitimate legislative purpose of self-protection. Unfortunately, notably under the chairmanship of Congressman Martin Dies, the House Committee has too often been inclined to abuse its powers, 'to make intolerance synonymous with patriotism by branding as un-American any one indulging in criticism of existing institutions'[7] and by allowing, under the shield of privilege, certain federal employees of liberal views to be abused as 'irresponsible, unrepresentative, crackpot, radical bureaucrats'.[8]

It is clear that, despite the constitutional guarantees of freedom of speech, non self-incrimination, and due process and the general safeguard of a Supreme Court hearing, provisions dealing with subversive activity are of a far more drastic character in the United States than in this country. In England, loyalty and orthodoxy are not synonymous and no town council could announce, as has happened in America,[9] that it will gaol any one found guilty of voluntary association with a Communist. The terms of our Official Secrets Acts may be unduly wide but are infrequently employed to-day. With no written constitution to confine the limits of executive power conferred by Parliament, we have nevertheless found in practice, if not in theory, a truer balance between the rights of the individual and the demands of the State.

CONCLUSION

"*Salus populi suprema lex*" is a maxim which can apparently justify many evils. Wide powers are open to wide abuse, and whilst acts endangering the safety of a nation, to be dealt with efficiently, demand grave measures, both the legislature and the courts must ensure that these are neither misapplied nor extended by the executive without justification. To adopt repressive action is sometimes necessary but always dangerous, and on its success in reconciling the rights of the State and the individual depends a nation's heritage of personal freedom. To quote a recent American writer: 'Security is never an absolute. It is attained in its optimum state not when all risk has been excluded, but when risk has been brought into rational balance with the ends which security is supposed to serve'.[10]

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[7] Professor Robert Cushman, *Civil Liberties and Public Opinion* in *Safeguarding Civil Liberties To-day* (1945).

[8] In the course of the Congressional Investigation of Mr. Robert Lovett and others in 1943.

[9] In Birmingham, Alabama.

In England we have, it is felt, largely succeeded in solving this problem of reconciliation by the gradual and typical process of trial and error, but should the powers of the executive be expanded still further as international tensions increase, they must, for our ultimate security, conform in both theory and application to those traditional concepts of liberty of thought and expression which are the distinctive feature of our national existence.

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[10] Alan Barth, *The Loyalty of Free Men*, p. 95.

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THE STATE AND TITLE TO LAND

Richard C. FitzGerald

October, 1952, saw the publication of the seventeenth edition of *Burke's Landed Gentry*, and a perusal of this edition gives one some idea of the social changes which have taken place since the appearance of the first edition in 1836. The qualification for inclusion in the first edition was ownership of 5,000 acres, but the importation of cheap American corn which began in the 1870s consequent on the repeal of the Corn Laws brought ruin to many farmers, and the qualification was in 1880 reduced to 2,000 acres. By 1914 the qualification had been reduced to 500 acres, and the editor of the edition published that year referred to the vicious and crushing burden of the taxation levied upon land. In the edition published in 1921 about one-quarter of the entries described former landed families as having sold their estates, and quite one-half of the entries in the 1952 edition relate to landless families. As the severity of death duty and taxation will in all probability continue, it is possible that the great majority of the entries in future editions of *Burke's Landed Gentry* will relate to landless families, the book being published really for the purpose of recording the pedigrees of the familes comprised in those editions.[1]

It is clear that the era of large private landowners is drawing to its close, and that the ownership of the land of Great Britain is passing at a rapid rate to the State, public corporations, local authorities, and the 'one-plot' landowner.[2] This has already had, and is bound to continue to have, a profound effect on the attitude of the community to the law of real property and the practice of conveyancing. For centuries family settlements were designed to preserve the family estates, generation by generation, from youthful extravagance, but now, because of heavy taxation and death duties, the process is being reversed. Fathers are now anxious to transfer their control of the family landed estates to their sons so as to provide a possibility of the land remaining in the family. To make this a real possibility such control must be transferred at a time when the father has every prospect of living for at least another five years, and this usually results in a son obtaining control at a much earlier age than his ancestors would have considered desirable or decent. That is the position as regards existing settlements of land. The new classes of landowners have little or no use for the family settlement, and the present situation in Great Britain is analogous to that which has always prevailed in Australia. 'The first settlers in Australia brought with them not only the English law of real property but also the English practice as to conveyancing . . .'.[3] 'From the practical point of view, the fact that the early settlers were not members of the landed classes, meant that certain transactions with real estate, common in England with such classes, were far more infrequent in Australia, and this influence is still noticeable. Estates tail were uncommon, and are today very seldom met with. Marriage settlements were (and still are) the exception rather than the rule'.[4]

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[1] Even the 1952 edition includes for the first time some 500 families who have never owned land. Their claim to inclusion is the possession of a coat of arms and an interesting pedigree. These families include that of Hart, descending from Shakespeare's sister Joan Hart.

[2] It is estimated that about 8½ million acres of land in Great Britain have already become subject to State control. To mention one or two examples, the Forestry Commission already owns over 1½ million and anticipate acquiring another 2 million during the next 40 years or so; the National Coal Board owns nearly ¼ million acres not counting land actually occupied for colliery purposes, and the Ministry of Agriculture and Fisheries either owns or controls ¼ million acres. About 3 million acres are scheduled for National Parks.

It is true to say, I think, that the changed, and changing, social and economic conditions in Great Britain have brought about a marked decline in the creation of all kinds of settlements of land, whether made on marriage or otherwise. The Bar Committee stated in 1886 that '. . . the practice of settlement is quite common even in the humbler ranks of the yeomanry'.[5] It is doubtful whether such a statement could be truthfully made at the present time, even if the same class distinctions had remained. It may even be the case that existing conditions in England are creating in Englishmen the same feeling towards land as the Australians had, according to the Bar Committee, in 1886, *viz.*, that land is not generally regarded with any feelings due to particular sentiment, but is dealt with merely as a subject of commerce or convenience, like corn or timber.[6]

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[3] G. W. Paton, *The Commonwealth of Australia. The Development of its Laws and Constitutions* (1952), p. 123.

[4] *Ibid.*, p. 116.

[5] Bar Committee, *Report on Land Transfer* (1886), p. 90.

It is against this new background that the question of registration of title to land must be considered.

THE MAIN FEATURES OF THE SYSTEM OF REGISTRATION OF TITLE TO LAND

The three systems of recording the rights to and over land are (1) private conveyancing; (2) registration of deeds; and (3) registration of title. All three systems are at present operating in England; the system of registration of deeds operates in Yorkshire; the system of registration of title operates in the administrative counties of London, Middlesex and Surrey, and in the county boroughs of Croydon, Eastbourne and Hastings; and the system of private conveyancing operates in the rest of the country. 'Increasing recognition of the failure of Registration of Deeds led subsequent British Royal commissions in 1850, 1857 and 1870 to turn with increasing confidence for their remedy to the establishment of Registration of Title instead'.[7]

It is generally admitted that, so far as England and Wales are concerned, the defects of the system of registration of deeds are so serious that there can be no question of introducing that system so as to operate throughout those countries.[8] One of the main weaknesses of the system is that it only entails filing copies or relevant details of all conveyances privately prepared without any guarantee as to the genuineness or validity of such deeds. Lord Cairns, the then Lord Chancellor, when giving evidence before the Osborne-Morgan Committee in 1878, described a Registry of Deeds as a blind registry on the ground that such a registry tells one nothing about the title to the property but only that there are certain deeds in existence relating to the property.

On the other hand, registration of title to land is 'an authoritative record kept in a public office of the rights to units of land as vested in some particular person(s) or body for the time being, and of limitations of such rights',[9] and the Judicial Committee of the Privy Council has pointed out that the object of registration of title 'is to save persons dealing with registered land from the trouble and expense of going behind the Register, in order to investigate the history of their authors' title and to satisfy themselves of its validity. That end is accomplished by providing that any one who purchases bona fide and for value from the registered proprietor and enters his deed of transfer or mortgage on the register should thereby acquire an indefeasible right notwithstanding the infirmity of his author's title'.[10]

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[6] *Ibid.*, p. 92.

[7] Dowson and Sheppard, *Land Registration* (1952), p. 74.

[8] In Scotland and South Africa the system of registration of deeds has been constructively developed into a highly valuable system of land record: Dowson and Sheppard, *op. cit.*, p. 16.

In 1937 Sir John Stewart-Wallace, the then Chief Land Registrar for England and Wales, stated that the 'keynote of registration of title to land as established in England is that the machinery for the purchase and sale of land is assimilated to that of stocks and shares', and he further stated that its essential features are:—

(1) the abolition of the inconclusive, expensive and constantly repeated examination of title by private individuals by one final and authoritative examination by the State.

(2) As a result of this examination, the formation at H.M. Land Registry of a register of proprietors of land with a State guarantee that their title is good against the world, subject to such mortgages and other burdens (if any) as are set out on the register.

(3) The provision of a plan of scientific accuracy based on the ordnance map (in all cases revised up to date) identifying and delineating the land.

(4) The issue to the registered proprietor of a land certificate containing a facsimile of the register and of the plan identifying the land. This land certificate takes the place of the old-fashioned title deeds.

(5) The provision of simple forms (analogous to those used on the transfer of shares in a joint stock company) for selling and mortgaging the land which a layman can readily understand.'[11]

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[9] Dowson and Sheppard, *op. cit.*, p. 74.

[10] *Gibbs* v. *Messer* [1891] A.C. 248.

[11] Stewart-Wallace, *Introduction to the Principles of Land Registration* (1937), p. 14.

Over eighty years ago a Royal Commission in its Report said, 'What is the object of establishing a Registry, in England? Surely it is for the purpose of more easily and quickly transferring land. Ours is a commercial country, and we desire all property, even land, to pass readily from hand to hand. The thing wanted is not security of the landowners, for they are secure enough now; nor security of purchasers, for they are content with what they get in this respect; but ease of transfer.[12] . . . Now we conceive that no axiom can be sounder than this, that for an institution to thrive in a free country it must offer to people the thing that they want. If people want cheapness and speed, and we offer them expense and delay, they will reject the offer, though it may be accompanied with the most ample security. . . .: The problem is, not to find a perfect system of Land Transfer, recording with mathematical accuracy the nature and extent of the land and every interest in it, so that the record shall absolutely dispense with the necessity of ordinary examination and inquiries, but, to find a system, which not impairing the present security of owners or purchasers, and not exonerating a purchaser from the easy and obvious task of looking at the outward and visible state of the property, and making inquiry of persons in outward and visible possession of it, shall enable the legal ownership to be readily passed from hand to hand, and dispense with the necessity of inquiring after invisible equities and interests, whose only evidence is contained in private documents'.[13] Those views appear to me to be commonsense, and they were implemented by the passing of the Land Transfer Act, 1875, which Act also established the Land Registry of today.

Under the new system of land registration established by the 1875 Act,[14] (1) a good marketable title was no longer insisted upon. The Land Registrar was given a wide discretion in the acceptance of titles for registration, and he was enabled to accept titles to which technical objection could be made, provided he was satisfied that the holding under it would not be disturbed; (2) registration was confined to the full legal freehold or leasehold estate in the land, *i.e.*, all partial and equitable interests and dealings with them were excluded from the register; and (3) registration could be made with general boundaries only instead of ascertaining them to the last inch by inquiry and notice to all adjoining owners. This is, in broad outline, the system still operating at the present time, and therefore we can now turn to consider the essential features of the existing system set out above and enunciated by Sir John Stewart-Wallace.

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[12] J. J. Park, Professor of Law at King's College, London, discussed the question of registration in an introductory lecture to a course of lectures on conveyancing delivered in 1833. He said the perfect register (like the register of stocks and shares) is designed to protect the purchaser: the English system of conveyancing is designed to protect the rightful owner. See Holdsworth, *A History of English Law* (1952), Vol. 13, pp. 478–479.

[13] Royal Commission, *Report on Land Transfer and Registration* (1870), paras. 63 and 64. See also Arthur Hobhouse, Q.C., *Suggestions for amending the Law relating to the Devolution and Transfer of Land*, being an Address delivered at the Social Science Congress at Leeds, October, 1871. Mr. Hobhouse was a member of the Royal Commission.

[14] For this footnote see next page.

CONSIDERATION OF THE ESSENTIAL FEATURES OF REGISTRATION OF TITLE IN ENGLAND ENUNCIATED BY SIR JOHN STEWART-WALLACE

Taking each of the five essential features in turn, and using the same numbering:—

(1) *The abolition of the constantly repeated examination of title.* Practically the whole of the conveyancing work carried out in this country is done by solicitors, and it is common knowledge that with the advent of the Welfare State has come an increased demand for the professional services of solicitors. Anything, therefore, which enables solicitors to avoid wasting time is to be welcomed. And that is one of the benefits conferred by registration of title. The following case came to my knowledge very recently. The title to land many acres in area began with a marriage settlement made over fifty years ago, which settlement contained references to mortgages and annuities. The subsequent title deeds showed that the amounts of the mortgages had been incorrectly stated either in the settlement or in the subsequent reconveyances (the vendor was not sure which was the case), and he was hazy, too, about any outstanding claims to the annuities. He also apprehended that probably owing to the importation into the title deeds, including the settlement, of old descriptions and admeasurements, and the absence from the title deeds of plans, there might be some discrepancies

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[14] This new system was really that advocated by the Royal Commission of 1857, whose recommendations were not adopted in the 1862 Act. The 1862 Act was practically repealed by the 1875 Act.

between those descriptions and admeasurements and the modern description of the property contained in the contract for sale. His apprehension was well-founded. Further difficulties arose because all the title deeds were not in the possession of the vendor, and their whereabouts had to be traced. The perusal of the abstract of title in that case (the abstract was over fifty pages in length), and its examination against the original deeds, was a lengthy and wearisome business. As is usually the case, the vendor's title was in order, as one expected it to be, as on the occasion of his purchase of the property some two years earlier the title had been fully investigated. If the new owner wishes to raise a mortgage on the property, the title will be investigated again in exactly the same way on behalf of the mortgagees. And so it will go on unless the law is altered so as to extend the system of registration of title to the area in which such land is situated. There was nothing very unusual about this particular case. Every conveyancer is familiar with similar cases. Considerable time would have been saved in that one case if the title had been registered.

One looks forward to the day when the constantly repeated examination of that title, in common with all other titles to land, will have been abolished by the final examination of the title by the State, *i.e.*, by the officials at H.M. Land Registry. This final examination is always carried out on the first registration of the property. The Chief Land Registrar has jurisdiction to hear and determine objections, and a wide discretion, so that a reasonable and business-like view may be (and, in fact, is) taken in difficulties which arise.

It is admitted that abstracts of title of unregistered land are now shorter in length as a result of the reforms in the substantive land law which came into force on January 1st, 1926, but even a very short abstract of title takes time and money to prepare, and it cannot favourably be compared with the official photostat copies of the entries in the Register and of the plan relating to a registered property which the registered proprietor and his solicitor can obtain on demand for the small cost of 3s.

(2) *The State Guarantee.* This statement is misleading if it is intended to give the impression that the registered title is good against the world in all circumstances, and that the State guarantees the title in all circumstances.

If the registered proprietor is *in possession* of the registered land (which is the usual case) his title is good against the whole world, as the register will never be rectified against him, except:

(a) for the purpose of giving effect to an overriding interest.[15] In *Chowood Ltd.* v. *Lyall*,[16] prior to the date of purchase by Chowood Ltd. of unregistered land, the title to strips of woodland forming part of the land conveyed to that company had been acquired by Mrs. Lyall, an adverse possessor, *i.e.*, a squatter. The company was subsequently registered as the proprietor of the whole land, thus becoming the first registered proprietor. It was held that the adverse possession was an overriding interest and that consequently the register must be rectified against Chowood Ltd., the registered proprietor, in favour of Mrs. Lyall, the squatter. Legal proceedings were subsequently brought by the company claiming compensation in respect of the land taken out of its registered title as a result of the rectification of the register, and it was held that the company was not entitled to compensation, as the registration was expressly subject to overriding interests, and consequently the company could not be said to have suffered any loss because of the rectification of the register.[17] It is unlikely that a *Chowood Case* will arise again, as the trouble in that case was due to the boundaries not being clearly defined on the ground, and where that happens to be the position a registration cannot be effected unless and until the land has been officially surveyed and such fences, wall and boundary posts 4′ to 5′ high, or other physical features found as will enable the Land Registry officials to identify the land on the ordnance survey map. Pegs are not sufficient to define boundaries.[18]

(b) where the registered proprietor is a party or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which rectification of the register is sought,[19] or where the immediate disposition to the registered proprietor was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void.[20]

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[15] Land Registration Act, 1925, s. 82 (3).

[16] [1930] 2 Ch. 156.

[17] *Re Chowood* [1933] 1 Ch. 574.

[18] See Land Registry Form 1E. Counsel for the Crown at the public inquiry held in October, 1951, as to the desirability of extending compulsory registration of title on sale to the County of Surrey stated that it was not the practice of the Land Registry to insist upon this requirement, but it was stated in evidence given at the same inquiry that the erection of substantial boundary posts had been insisted on in the summer of 1951. See G. Boughen Graham, *The Land Registration Act, 1925, after twenty-five years, The Conveyancer and Property Lawyer* (1952), Vol. 16, pp. 160–161.

(c) where for any other reason in any particular case it is considered that it would be unjust not to rectify the register against the registered proprietor.[21]

The recent case of *Re 139, High Street, Deptford*[22] illustrates the way in which the statutory provisions mentioned in (b) and (c) operate. At the outbreak of war in 1939 the then lessees of No. 139, who were also the lessees of the adjoining property, which was in different ownership, surrendered their lessees, and the two properties remained vacant and became derelict. In 1948 X was minded to buy both properties, and at the date of X's purchase the only access to the said adjoining property (being the land the title to which was in dispute) was through No. 139. Both X and his vendors bona fide thought that the description '139, High Street, Deptford' included not only that property but also the disputed land. Both No. 139 and the disputed land were conveyed to X by description and without the aid of any plan, and X was subsequently registered as proprietor of both properties with an absolute title, and was in possession of both of them. Subsequently the Y Corporation, the owners of the disputed land, whose paper title went back to 1834, discovered what had occurred and raised objections, and the matter was referred to the High Court,[23] the question being whether or not the property register should be rectified by excluding from it the disputed land. The Land Registry had clearly made a mistake in including the disputed land in X's registered title, and as there was no element of fraud, the register could only be rectified if X had substantially contributed to the mistake made by the Land Registry. Mr. Justice Wynn-Parry said that when one looked at the surrounding circumstances one found that at the date of the contract and the conveyance to X the only access to the disputed land was through the immediately adjoining premises which, quite clearly, were known as '139,

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[19] Land Registration Act, 1925, s. 82 (3) (*a*).
[20] *Ibid.*, s. 82 (3) (*b*).
[21] *Ibid.*, s. 82 (3) (*c*).
[22] [1951] 1 All E.R. 950; [1951] Ch. 884.
[23] Under the Land Registration Rules, 1925, r. 298 (2).

High Street, Deptford', and that, therefore, as a matter of construction, the conveyance intended to include, and did include, the disputed land in the description '139, High Street, Deptford'. The determining factor, said his Lordship, was the circumstance that, so far as the physical aspect of the matter was concerned, the disputed land must have appeared to any one looking at the properties in question, to form part of 139, High Street. 'It was, apparently, so obvious that the vendors to the respondent [X] fell into the mistake, the respondent [X] himself fell into the mistake, and the Land Registry fell into the mistake'.[24] On that view of the matter it appeared to the learned judge to follow necessarily that X must be held to have contributed to the mistake within the meaning of the statutory provision.[25] He came to that conclusion with reluctance because the disputed land, although very small in area, was of importance to X, and X had expended money on it, but having so decided he ordered that the property register of X's registered title should be rectified by excluding from it the disputed land.

Had he not felt constrained to hold that there had been a mistake contributed to by X within the statutory provision, Mr. Justice Wynn-Parry said (in case the matter should be taken to a higher court) he would not have been prepared to rectify the register under section 82 (3) (*c*), *i.e.*, (c) above, as the applicants (British Transport Commission) had put forward no evidence to show that the disputed land was required by them for the purpose of their undertaking; the disputed land had remained derelict until X purchased it; X had since expended money on it; and the applicants would have been properly protected by their right to claim an indemnity.[26]

Mr. Justice Wynn-Parry also said that in his opinion section 82 (3) (*b*)—see the latter part of (b) above—is designed to deal with cases where the whole deed in question is a void instrument, either because it was a forgery, or for any other suitable reason, and that as there was a perfectly valid conveyance there was no room for saying that the disposition to X was void. It would follow, therefore, that the applicants would not have been entitled to rectification of the register under section 82 (3) (*b*).

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[24] [1951] 1 All E.R. 950, at p. 954.

[25] *I.e.*, Land Registration Act, 1925, s. 82 (3) (*a*).

[26] Under Land Registration Act, 1925, s. 83 (6) (*a*).

These views are valuable, notwithstanding that they are *obiter dicta,* as they appear to be the first judicial explanation of section 82 (3) (*b*) and (*c*).

X was subsequently compensated in full for the value of the land he had lost as a result of the rectification of the register, and also for his costs.[27] If the title to the land had been unregistered X would still have lost the disputed land, and he would have received no compensation from the State, and most probably would have had to pay the costs of both sides. If his vendor had conveyed the land as beneficial owner then X could have brought an action against him on his covenants for title, but a personal action of that kind is not so satisfactory as being entitled to an indemnity out of a State fund.

It may be remembered that statements appeared in the press to the effect that the murderer, J. G. Haigh, had dealt with the estates of at least one of his victims. It appears that this victim was the registered proprietor of land, and that Haigh forged a transfer from the victim to himself, got such transfer registered, whereupon, of course, he became the registered proprietor, and he then sold the land to Y, who took it in good faith and for value.[28] Y's title was considered impregnable, whereas if the land had been unregistered Y would have had no legal right at all to the land, and would have been deprived of it. So far as the law is concerned, Y would have had a claim in damages against Haigh, but it is doubtful if Y would have regarded that as a satisfactory remedy.

It must be admitted that a registered proprietor is not so well protected where he is not in possession of his registered land, as there are cases[29] where the register can be rectified against him. For example, the register may be rectified where two or more persons are, by mistake, registered as proprietors of the same registered estate, or where a legal estate has been registered in the name of a person who, if the land had not been registered would not have been the estate owner, or where, of course, any entry on the register has been obtained by fraud.[30] The owner of unregistered land runs the same risk of losing his land, in the same circumstances, but he is not in such an advantageous position as a registered proprietor, because the latter, *inter alios*, is entitled, if he suffers loss by reason of any rectification of the register, to be compensated out of the State insurance fund.[31] Moreover, a proprietor of any registered land or charge claiming in good faith under a forged disposition is deemed, where the register is rectified, to have suffered loss by reason of such rectification and to be entitled to compensation.[32] Further, the Registrar has power to add to the amount of the compensation any costs and expenses properly incurred in relation to the matter.[33]

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[27] W. J. L. Ambrose, *The Land Registration Act, 1925, after twenty-five years—Another View, The Conveyancer and Property Lawyer* (1952), Vol. 16, p. 361. Mr. Ambrose is a former member of the staff of the Land Registry.

[28] The Haigh case was quoted by the Chief Land Registrar in evidence before the above-mentioned public inquiry concerning the County of Surrey: see G. Boughen Graham, *op. cit.*, pp. 94–95.

[29] The full list of cases is set out in Land Registration Act, 1925, s. 82 (1).

In the normal case of registration with an absolute or good leasehold title, the claim to compensation is enforceable only if made within six years from the date of registration.[34]

Enough has been said, it is submitted, to show that the position of the proprietor of registered land, when it comes to security of title and to compensation for loss when the register is rectified, is to be preferred to that of the owner of unregistered land.

The second essential feature as framed by Sir John Stewart-Wallace is misleading, too, in that it omitted to say that the registered title, in addition to being subject to such mortgages and other burdens (if any) as are set out on the register, is also subject to 'overriding interests', *e.g.*, easements, and rights of persons in actual possession of the land.[35] The omission has, however, since been put right, as the leaflet issued by the Land Registry in August, 1946, adds the following words at the end of Sir John's wording, *viz.*, 'and to such rights of way and other rights (termed overriding interests and not entered on the register) as may affect the land'.

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[30] Land Registration Act, 1925, s. 82 (1) (*d*), gives the Court power to rectify the register where it is satisfied that any entry in the register has been obtained by fraud. In *Re Leighton's Conveyance; Re The Land Registration Act, 1925* [1936] 1 All E.R. 667, a daughter, without explaining the true nature of the document to her mother, who was the registered proprietor, secured the mother's execution of the necessary transfer and her own registration as owner with an absolute title. It was held that the mother was entitled to rectification of the register by the substitution of her name, as registered proprietor, for that of her daughter.

[31] Land Registration Act, 1925, s. 83 (1) and s. 85 (1). No compensation is payable where the person claiming compensation has himself substantially contributed to the loss by fraud, or on account of mines or minerals unless a note is entered in the register that they are included in the registered title: Land Registration Act, 1925, s. 83 (5) (*a*) and (*b*).

[32] *Ibid.*, s. 83 (4). This statutory provision reverses the odd decision of the Court of Appeal in *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47.

[33] *Ibid.*, s. 83 (8).

[34] *Ibid.*, s. 83 (11).

These overriding interests are important, particularly to a purchaser, but it should be remembered that if registered land is subject to any overriding interest then in practically every case it would still have been subject to it if the title to the land had remained unregistered. In other words, a purchaser knows he should make the same searches and inquiries (with the exception of searching in the Register of Land Charges) for registered land as for unregistered land.[36] Registration of the title to land does not relieve any one of the liability to make the ordinary investigation so far as overriding interests are concerned, and the fact that it does not cannot, in my view, be regarded as a defect in the system. The register is a substitute for the documentary or parchment title. It is a basic principle of the system that the register shall be a substitute for title deeds and nothing more, and that nothing not shown in the title deeds should be shown by the register. Why, *e.g.*, should not a purchaser of a house, the title to which is registered, be subject to a wife's right to occupy the house[37] to the same extent that he would have been if the title had been unregistered?

(3) *The title plan.* Sir John Stewart-Wallace has pointed out that there is a close liaison between the Land Registry and

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[35] *Ibid.*, s. 70. As the name implies, 'overriding interests' are those interests in land which are enforceable against a registered proprietor even though no mention of them is made on the register, *i.e.*, they override the register. Overriding interests are not peculiar to the English system. They exist in practically every system of registration of title. They are found, *e.g.*, in the Torrens system, which operates in each of the six States of Australia, but they vary from State to State: see G. W. Paton, *op. cit.*, p. 126.

[36] In this connection, see the views contained in paras. 63 and 64 of the *Report on Land Transfer and Registration* (1870) and given above.

[37] *Errington* v. *Errington* [1952] 1 All E.R. 149; *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307; and *Ferris* v. *Weaven* [1952] 2 All E.R. 233. In *Woolwich Equitable Building Society* v. *Marshall and Another* [1951] 2 All E.R. 769, at the date of completion of the legal charge in favour of the plaintiff Building Society, X was in occupation of the top-floor flat of the registered property, and it was held that by virtue of his occupancy X was the owner of an overriding interest and that the rights of the plaintiff Building Society were subject to those of X.

the Ordnance Survey Department; that all registrations are based on a map which is absolutely up to date, prepared by scientific triangulation with the meticulous accuracy of the Ordnance Survey Department; and that the Land Registry has itself a staff of highly skilled surveyors for the purpose of preparing the Land Registry plans, and keeping all Land Registry maps constantly up to date.[38] 'Thus all doubts or difficulties as to the identification of registered land (a fruitful source of confusion in the case of unregistered land) are removed'.[39] There is no doubt that the 'plan of scientific accuracy' does identify the land, but only rarely does it define the boundaries. Consequently it does not really help the registered proprietor in any dispute concerning boundaries. This question of boundaries, however, is a ticklish one, and is discussed at greater length below. It is interesting to note that the leaflet issued by the Land Registry in August, 1946, states this essential feature as '3. The provision of an accurate plan based on the Ordnance Survey Map identifying and delineating the land'.

(4) *The Land Certificate.* The Land Certificate which is issued to the registered proprietor is an important document, and it has the merit of being readily understood by a layman, which sharply distinguishes it from an ordinary title deed. It consists of three registers. The *Property Register* contains a short and clear description of the land, and identifies the property clearly and easily by reference to the Land Registry General Map, a copy of the relevant part of which is attached to the Certificate. The *Proprietorship Register* states the class of title[40] with which the property is registered, and the name, address and description of the registered proprietor. It also contains any restrictions on the registered proprietor's power of dealing with the land, and any cautions requiring notice to be served on any other person before any registration can be completed. The *Charges Register* contains particulars of any mortgages, leases, restrictive covenants, and any other incumbrances affecting the land. The Land Certificate is, in fact, a facsimile copy of the original Register itself relating to the property. The original Register must always be kept in the Land Registry. The

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[38] Stewart-Wallace, *op. cit.*, p. 16.

[39] *Ibid.*

[40] *I.e.*, Absolute, Good Leasehold, Possessory, or Qualified.

Land Certificate can be sent to the Land Registry at any time to be officially compared with and made to correspond with the original Register without payment of any fee. In this way the registered proprietor, when contemplating a sale or mortgage of his land, is always in a position to show his title right up to date.

The Land Certificate is the kind of title deed the ordinary owner wants and, when he is registered with an Absolute or Good Leasehold Title, the only one he wants. The former Chief Land Registrar was right to emphasise that it takes the place of the old-fashioned title deeds. Most solicitors can point to personal experiences of having, on the completion of a client's purchase of unregistered land, to take over bundles and bundles of old title deeds and documents. Sometimes a taxi or other means of transport has had to be hired to get the deeds to the office. Private landowners more often than not deposit their title deeds for safe custody with either their solicitors or bankers. This custom must put a strain on the storage space at the command of solicitors and bankers, and as it is unusual for a solicitor to make any charge for looking after a client's title deeds, the cost of providing storage facilities, which is not cheap, falls on the solicitor. Looking after the Land Certificate, however, is an entirely different proposition, and the system of land registration may even persuade the private landowner to have personal possession of his Land Certificate, even if he lives in a modern flat.

In 1942, Mr. Randall, 'writing avowedly from the standpoint of the country practitioner', stated that '. . . a deep sentiment and an historical interest attaches to a parcel of title deeds that may contain the history of the property for a century or more; it is no small part of the family treasures: To a land certificate no such sentiment or interest could possibly attach itself'.[41] It is delightful to think of the members of a family all sitting round the table and lovingly perusing each title deed as it is passed round. Even if it were ever done, and I feel sure it was not in the vast majority of cases, family life on those lines is fast disappearing, and the modern generation has not much time for family treasures. In fact, they regard them as being too old-fashioned to keep.

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[41] H. J. Randall, *The Demerits of Registration of Title, The Conveyancer and Property Lawyer* (1942), Vol. 6, p. 163.

My own professional experience does not enable me to support Mr. Randall. The ordinary landowner, whether he lives in town or in the country, values his title deeds not for sentimental reasons but because they will enable him to get his money back. Moreover, he is more likely to be proud of a Land Certificate, embellished as it is with the coats of arms of six former Lord Chancellors of England, than of title deeds in which his predecessors in title are stated to have been 'seised in fee simple absolute in possession free from incumbrances', which to him sounds disgusting, because he has not the faintest notion of what it means. Can one be sure, too, that the modern typewritten title deed will last for thirty years,[42] *i.e.*, long enough for it to become, in its turn, the root of title? I have seen conveyances not twenty years old of which the typed contents had faded to such an extent as to make them almost unreadable.

I do agree with Mr. Randall when he says that transfers of registered land are 'most unsatisfactory historical documents in any case because in addition to their brevity they contain no recitals'.[43] Registration of title to land, however, is concerned, not with history, but with making it as easy as possible to transfer the legal ownership of land. Having regard to the shoals of forms most members of the community have already had to complete, and to those which undoubtedly will come their way, future historians should not find themselves starved of material.

(5) *Simple forms.* The forms of transfer and charge are similar in shape, size and general design to the forms of transfer of stocks and shares, and they may be altered in any way required to meet the special needs of any case. So far as the ordinary case is concerned, it is true to say that a layman can readily understand the forms. The transfer of, *e.g.*, the whole of the freehold property comprised in a specific title, states quite simply that in consideration of the purchase price the registered proprietor, as beneficial owner, transfers to the purchaser the land comprised in that title. Nothing could appear to be simpler. But although a layman can readily understand the form it is doubtful whether he understands all the legal consequences of properly completing such a transfer. For instance, it is fairly certain that he knows nothing of the covenants for title which

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[42] Law of Property Act, 1925, s. 44 (1).

[43] Randall, *op. cit.*, p. 163.

are implied in the transfer by using the expression 'as beneficial owner'. Such legal consequences, however, are due in the main to the substantive land law and not to the system of registration of title, and they cannot be considered in this paper.[44] In any event, land registration 'has no necessary relation to English real property law at all'.[45]

The simplicity of the usual form of transfer is disliked by some practitioners. One had 'a deep sense of shame that the elegant art of conveyancing should sink to such depths of fatuity and incompetence'.[46] Every one, of course, is entitled to his opinion, but it is submitted that the simple form of transfer is much to be preferred to the form of conveyance of unregistered land. The former can be understood by ordinary members of the community. Lord Westbury described title deeds of unregistered land as 'difficult to read, impossible to understand, and disgusting to touch', an opinion which is heartily endorsed by most people whose fate has brought them into close association with title deeds.

GUARANTEED OR GENERAL BOUNDARIES?

The question of how land should be described on the register and what part maps and plans should play in that description has always been a controversial one, due mainly to the fact that registration of title involves both the administrator and the surveyor. The administrator, of course, can only do what the Act of Parliament establishing the system of registration of title authorises him to do, whereas map making is a science, and 'Science is free to seek the best and in its effort to produce a true and accurate map of the earth's surface it need have no regard to Acts of Parliament'.[47] Further, the surveyor thinks of maps of whole areas rather than of plans of particular properties, and thinks of them from the point of view not only of the whole country but ultimately of the globe itself. Land registration, however, is concerned with particular properties only—it works from the part to the whole—and provided such a plan is provided, says one school of thought, as enables any particular registered property to be identified on the site, land registration is indifferent whether or not the plans of particular properties fit in with scientific accuracy on geodetic maps of the whole country.[48] The other school of thought says 'That the boundaries of parcels registered with a legally valid title should themselves be validly defined would appear to be such an indisputable feature of title registration as to require no further mention'.[49] Sir Charles Fortescue Brickdale, a former Chief Land Registrar, expressed the view that '. . . guaranteed title without guaranteed boundaries is clearly a very incomplete thing, and if ever any questions arise on these unguaranteed boundaries the public will receive a caution against trusting to registered titles that they will probably not forget'.[50]

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[44] Attention should, however, be directed to the valuable comment of the late Professor Potter that 'the problems of covenants for title, indemnity covenants in respect of existing incumbrances, and other such matters have received little attention at the hands of the practitioner because they do not concern the form of the Register' made on p. iv of the Preface to Vol. 3, *Key and Elphinstone's Precedents* (14th ed., 1940). The case of *Cator* v. *Newton* [1940] 1 K.B. 415; [1939] 4 All E.R. 457 (C.A.) referred to by Professor Potter shows the danger of not altering the usual form of transfer to meet the special needs of the case.

[45] Stewart-Wallace, *op. cit.*, p. 2.

[46] Randall, *op. cit.*, p. 161.

[47] Stewart-Wallace, *op. cit.*, p. 61.

Theoretically there can be no doubt that the boundaries of registered land should always be guaranteed. But, as so often happens, that theory did not work in England. The Land Registry Act, 1862,[51] insisted on meticulous accuracy in defining property boundaries. No land was registered under that Act before the service of notice on adjoining landowners. An official perambulation of the ground was made for the purpose of fixing the property boundaries exactly, and the Land Registry prepared a plan on which symbols were inserted on the external fences or other physical features to show whether or not the property boundaries coincided with them. If they did not coincide, it was further shown whether the property boundaries were inside or outside the physical boundaries; if necessary, the exact difference between them was indicated by figured dimensions on the plan. The plan became conclusive evidence as to the property boundaries, freeing them from all dispute—dormant or otherwise.[52]

The forcing of every landowner who applied for registration and his neighbours to fight for their rights to the last inch or for ever after keep silence resulted in the complete breakdown of the 1862 system. The Royal Commission which was appointed to inquire into the causes of the breakdown and which reported in 1870, stated that one of the chief causes of failure was the necessity of there being a precise official delimitation of the property boundaries of registered land on a plan, and it pointed out, *inter alia,* that, in England, if there is any borderland over which the precise property boundary is obscure, the purchaser is usually content to take the property as his vendor had it and to let all questions of boundary lie dormant.

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[48] Stewart-Wallace, *op. cit.*, p. 62.
[49] Dowson and Sheppard, *op. cit.*, p. 124.
[50] Fortescue-Brickdale, *Registration of Title to Land* (1886).
[51] See s. 10.
[52] Stewart-Wallace, *op. cit.*, p. 64.

The failure of the 1862 Act led to a complete reversal of policy as regards plans and boundaries. The Land Transfer Act, 1875, enacted[53] that registered land should be described in such manner as the registrar thought best calculated to secure accuracy, but that such description should not be conclusive as to boundaries or extent of the registered land. The matter is now governed by the Land Registration Act, 1925, which provides[54] that registered land may be described, *inter alia,* by means of a verbal description and a filed plan or general map, based on the ordnance map; or by reference to a deed or other document, a copy or extract of which is filed at the Land Registry containing a sufficient description, and a plan or map thereof; but that such plan or map shall be used for assisting the identification of the land. This plan or map is no longer conclusive evidence should any dispute as to property boundaries arise between adjoining owners. Regard, however, must be had to ready identification of parcels, correct description of boundaries, and the boundaries of all freehold land, and all requisite detail in relation to the same, must wherever practicable, be entered on the register or filed plan or general map.[55]

Strange as it may be to those who think that guaranteed boundaries are absolutely essential to the successful working of any system of registration of title, the method of general boundaries 'has been one of the corner stones in the practical and popular working of land registration in England'.[56] This is not to say that the method would work everywhere. The temperament of the people for whose benefit the system of

[53] Land Transfer Act, 1875, s. 83 (5).

[54] Land Registration Act, 1925, s. 76.

[55] Land Registration Act, 1925, s. 76.

[56] Stewart-Wallace, *op. cit.*, p. 71.

registration has been established has obviously to be taken into account. No dispute concerning boundaries, not even a serious one, is likely to lead to bloodshed in England, which, apparently, is more than one can say of other parts of the world.[57]

Should a registered proprietor, however, wish to have the boundaries of his land conclusively determined as against adjoining owners, he is entitled, at his own cost, to apply to the Chief Land Registrar to determine the boundaries precisely, but the Registrar, before doing this, must serve notice on all adjoining owners and must hear and determine at a judicial hearing any dispute which may arise.[58] It is rare for such an application to be made.

The method of general boundaries[59] also prevails in Ireland, Ontario, Tanganyika, Nigeria and the Sudan, due to the fact that their respective systems are based on the English system. In all other countries the necessity for a valid definition of boundaries is accepted.[60]

Mr. Miskin, in the paper he recently read to the Royal Institution of Chartered Surveyors, said that land registration has three main objects, namely, to guarantee boundaries, to give security of title, and to facilitate dealings.[61] In reply to my question as to whether it is generally accepted that one of the main objects of land registration is to guarantee boundaries, and also in reply to other questions raising the issue of general versus exact boundaries, Mr. Miskin put forward the proposition that the boundaries must always be ascertainable on the ground with an accuracy sufficient to prevent litigation about them. Whether this were effected by a Registry survey, or by licensed surveyors or, in England, by the aid of the new Ordnance Maps, seemed unimportant.[62] As there is little litigation in this country concerning boundaries of registered land, Mr. Miskin's proposition can be regarded as approving, impliedly at least, the system of general boundaries so far as this country is concerned. The approval of such an eminent surveyor as Mr. Miskin should make critics of the system of general boundaries think again.

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[57] Dowson and Sheppard, *op. cit.,* p. 82.

[58] Land Registration Rules, 1925, Rules 276 and 277.

[59] The term 'general boundaries' is a euphemism for uncertain boundaries: Dowson and Sheppard, *op. cit.,* p. 124. Not everyone would agree with this view.

[60] Dowson and Sheppard, *op. cit.,* p. 124.

[61] Miskin, *The Registration of Agricultural Land, Journal of the Royal Institution of Chartered Surveyors,* April, 1952, p. 721–728, at p. 721. Mr. Miskin is lately Senior Inspector of Survey, Sudan Survey Department.

[62] *Discussion* of Mr. Miskin's paper *The Registration of Agricultural Land, Journal of the Royal Institution of Chartered Surveyors,* July, 1952, pp. 71–77, at p. 76.

CONSIDERATION OF THE GROUNDS OF OBJECTION TO THE EXTENSION OF COMPULSORY REGISTRATION OF TITLE ON SALE TO THE COUNTY OF SURREY

In October, 1951, a public inquiry[63] was held as to the desirability of extending compulsory registration of title on sale to the County of Surrey.[64] The extension was opposed by the three local Law Societies. The South-East Surrey Law Society and the West Surrey Law Society contended that no extension of compulsory registration to any part of England is at present desirable, basing this view on the following allegations,[65] *viz.*:—

(1) *The System interferes with freedom of contract.* One wonders how many purchasers of unregistered land feel that they have freedom of contract. The late Mr. Eustace Harvey wittily paraphrased the vendor as in effect saying to the purchaser: 'You have to take the land as I happen to describe it, whether that description be correct or not. With regard to the title deeds and evidence of facts, you must content yourself with such as I happen to have in my possession (which may be none at all); the rest you must search for and pay for their production. The title you must accept or reject just as it happens to be. You are bound to complete the sale on pain of forfeiting your deposit, but I reserve the right to withdraw from the contract at any time'.[66] For years now vendors have had things all their own way, and if registration of title helps to restore a balance between vendors and purchasers, then the system should be extended to the whole country as quickly as possible so as to interfere with the freedom of contract now enjoyed by vendors.

(2) *It is undesirable to establish a government monopoly in the control of the transfer of land.* Now, as Dicey pointed out,

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[63] Pursuant to Land Registration Act, 1925, s. 122.

[64] Other than the County Borough of Croydon, to which area the system was extended in 1939.

[65] *Report on the advisability of extending Compulsory Registration of Title on Sale to the County of Surrey* (1951), para. 10. This Report is hereinafter referred to as the *Report on Surrey*.

[66] Quoted by Stewart-Wallace, *op. cit.*, pp. 7–8.

'Circumstances are the creators of most men's opinions',[67] and in my opinion it is true to say that circumstances are now such that the community easily perceives the benefits to be derived from interference of the State in the system of transfer of land. The 'control' carries with it a State guarantee of title, and it is a monopoly which does operate for the benefit of the individual. In any event, it is rather late in the day to make this allegation, as also it is to make the first allegation, because, as the Report on Surrey states, both allegations are inconsistent with the decision of Parliament in 1925 that the principle of land registration is prima facie beneficial.[68] Cannot it be said, too, that the existing system of transferring unregistered land is a monopoly vested in the legal profession? The United States of America supply an illustration of a vested interest having a retarding effect on the development of land registration. Registration of title to land has been established in seventeen American States, but without marked success, largely due, it is thought, to the vested interest of the various Land Titles Insurance Offices.

(3) *There is a serious danger of the destruction of records in time of war.* Of course there is, but does it justify a policy of *laissez-faire*? As is pointed out above, the Land Certificate consists of facsimile copies of the entries in the Register and of the relevant part of the Land Registry General Map. Registered proprietors could be of great assistance in the event of the original records being completely destroyed, as by bringing in their Land Certificates they would enable new registers to be prepared. It is possible, though, that the Land Certificates themselves may also be destroyed, in which case the compilation of new registers would be extremely difficult to make. The Napier Land Registry in New Zealand was completely destroyed by the Hawke's Bay earthquake in 1931. A special Act was needed to enable the Napier disaster to be retrieved, and the recompilation of the maps alone cost upwards of £100,000. Safety duplication has since been established in New Zealand.[69] The consequences of destruction can be considerably safeguarded against by duplication of the records by photostat or microfilm and keeping the duplicate sets in widely scattered parts of the country.

[67] Dicey, *Law and Public Opinion in England* (2nd ed., 1914), p. 27.
[68] *Report on Surrey*, paras. 9 (2) and 11.
[69] Dowson and Sheppard, *op. cit.*, p. 77.

It seems to me that the possible danger of destruction of records is an argument in favour of extending the system of registration. Take this case. A landed estate has been split up into 300 plots, on each of which a house has been built, and each of which has been sold to a different purchaser, none of whom has registered his title. The last purchaser, following a common practice, took over all the title deeds relating to the estate on the completion of his purchase, and all of them are subsequently destroyed. The result is that the title deeds to 300 properties have been destroyed, and there is no second copy of them to fall back on, as there is in the case of registered land. Moreover, the cost of obtaining the best secondary evidence as a substitute for the destroyed title deeds would fall on the private owner, whereas the cost of recompiling the records of the Land Registry would fall on the whole community.

(4) *Difficulties would result from moving the Land Registry (as has been contemplated at some future date) away from London.* This allegation is not understood. Personal attendance at the Land Registry is not required; in fact the Land Registry discourages it. As everything can be done through the post does it matter where the Land Registry is situated? Sir Charles Fortescue-Brickdale thought that the most suitable territorial unit for compulsory registration is '. . . a district containing a population of about four millions. If compulsory registration were eventually to extend to the whole of England and Wales, this would involve the institution of eight or nine Registry Offices, including the London Registry. . . . The situation of the District Land Registry Offices would be selected with regard to the facilities for communication by railway with the area dealt with'.[70] The district offices should be branches of the principal Registry,[71] and their records, too, would help in the recompilation of any destroyed records. 'Registry offices are widespread throughout France, one is to be found in nearly every market town'.[72] The Land Transfer Committee which reported in 1943 was of the opinion that it would be unnecessary, unjustifiably expensive, and indeed dangerous as multiplying

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[70] *Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales,* Cmd. 424–1919, para. 48.

[71] *Report of the Land Transfer Committee,* Cmd. 6467–1943, para. 15.

[72] Dowson and Sheppard, *op. cit.*, p. 54.

opportunities for mistake for every town to have its own branch office.[73]

Professor Dudley Stamp has suggested that the Lord Chancellor should consider in advance the number of branch registries eventually to be established and the area which each is to serve, and that the areas should coincide as far as possible with those used for planning purposes, such as town planning, housing and agricultural usage.[74]

Even if the existing office of the Land Registry never has the assistance of district offices, and it remains the sole office, no difficulties need arise merely because it may have been shifted from London.

(5) *Extra expense will be caused to land owners on first registration, the more so at the present time owing to the unusual number of sales that are taking place and the exceptionally high prices at present prevailing.* This objection was rejected by Mr. Neville Gray, Q.C. (who conducted the public inquiry) because he had no evidence that either the volume of sales or the prices ruling are likely to fall in the near future.

(6) *There is no public demand for any extension of compulsory registration.* One need add nothing to the reasons given by Mr. Neville Gray for rejecting this objection, *viz.*, '. . . it could not be expected that there would be any evidence of public demand; the general public has not sufficient knowledge to form an opinion. On the other hand the large number of voluntary registrations shows that some landowners recognise that registration is advantageous at any rate in some circumstances'.[75]

(7) *The State guarantee is not usually effective.* This matter is dealt with above, and all that need be said here is that Mr. Neville Gray agreed that it is no doubt true that there are cases where the State guarantee does not secure the registered owner against being deprived of his land but that he was satisfied after examining instances of such cases that in the vast majority of cases it does afford real security.[76] Enough is said above concerning the State guarantee to satisfy any reasonable person that the guarantee is worth having.

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[73] Cmd. 6467–1943, para. 14.

[74] *Additional Memorandum to Report of the Land Transfer Committee,* Cmd. 6467–1943.

[75] *Report on Surrey,* para. 11.

[76] *Ibid.*

The third Society opposing the extension, the Mid-Surrey Law Society, did so on the grounds that though compulsory registration may in itself be advantageous (a) it is not desirable that it should at present be extended at all; and (b) if any extension took place it should not be to Surrey.[77] These objections were also rejected, mainly for the reasons that although the advantages of registration are greatest in relation to land which has been, or is about to be, developed, they extend also to rural land (Surrey is a 'mixed' area) and it is desirable to extend compulsory registration on sale to Surrey[78] having regard to the findings of fact, *inter alia,* that up-to-date ordnance maps of Surrey are available for the use of the Land Registry; that the Land Registry has sufficient trained staff to undertake the work; that the extent of voluntary registration of land has been greater in Surrey than in any other county; and that Surrey adjoins other compulsory areas.[79]

CONCLUSIONS

The system of conveyancing applicable to unregistered land has become unsuited to the requirements of the times. It was suitable when it mainly concerned the wealthy landed class, the members of which had, amongst other things, muniment rooms in which to keep their title deeds, but the new type of landowner has a different attitude to ownership of land. The small landowner in particular, who, as Dicey pointed out, feels more strongly than any other class the joy of ownership,[80] wants to be assured that his right to ownership is indefeasible, and that when he wishes to dispose of his property he will be able to do so quickly and cheaply. A transfer of registered land is 'somewhat simpler and to a material extent cheaper than a conveyance of unregistered land, the saving in expense being most marked in the case of dealings with small quantities of land'.[81] An ideal system of land transfer should be simple and cheap, and it should be adapted to the needs and even to the prejudices of the community.[82] It is submitted that that is what the English system of registration of title has always tried to do and be. 'The objectives sought from the establishment of a General Land Register of England and Wales, ever since the movement to do so was launched by the Real Property Commissioners in 1830, have been exclusively to improve security of title and to facilitate the transfer of land in individual ownership, with a tendency to concentrate on the latter as other factors contributed to the former'.[83] One would have thought that the lawyers would have given their full support to the achievement of these objects for the whole country. But the most strenuous opposition to registration of title has always come from them. When Torrens' Bill for the reform of the law relating to conveyancing was passed by the legislature in South Australia and became law in 1858 it received no support from the legal profession, which did its best to disparage the reform.[84] Opposition to the system is still coming from some lawyers in this country, and it is a pity that lawyers, as a whole, cannot see that land registration is a much needed social reform and that 'The case for registration of title is not that land owners should deal with land without lawyers but that by the elimination of the old-fashioned examination of title laymen are enabled, once the land has been registered, while employing lawyers, to deal with it at a greatly reduced figure after both the lawyer's costs and the Land Registry fees have been paid'.[85]

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[77] The South-East Surrey Law Society and the West Surrey Law Society also took the same objections, as an alternative case to the seven grounds dealt with above: *Report on Surrey,* para. 12.

[78] *Report on Surrey,* para. 20.

[79] *Ibid.,* para. 9 (19)–(25), and para. 13. The extension to Surrey must be gratifying to the London County Council, who, on April 30, 1929, recommended 'That, in the opinion of the Council, an extension of the area in which registration of title to land is compulsory on sale, so as to include properties in counties adjacent to London, would be in the public interest'.

[80] Dicey, *op. cit.,* Introduction, p. lxxvi.

[81] *Report on Surrey,* paras. 9 (9) and (10).

No one would suggest that the present system is perfect. In fact it is admitted that certain defects[86] in the administration of the registration of land have become apparent during recent years, some of which were brought to the knowledge of the Chief Land Registrar only during the course of the 1951 public inquiry concerning Surrey.[87] The Chief Land Registrar welcomed the proposal that an advisory body should be set up, comprising representatives of those who have to work the system and representatives of the Land Registry, for the purpose of discussing difficulties which arise from time to time and finding the best remedies for them, and said he would at once join in setting up such a body.[88]

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[82] *Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales,* Cmd. 424–1919, para. 39.

[83] Dowson and Sheppard, *Compilation of the Land Register of England and Wales, Empire Survey Review* (1949), Vol. 10, p. 63. Also, Dowson and Sheppard, *Land Registration,* p. 41.

[84] Paton, *op. cit.,* p. 124. 'As a result, the Government later licensed unqualified persons who had passed certain elementary examinations in conveyancing, and allowed them to prepare for reward the simple instruments which Torrens had substituted for the highly technical deeds . . . at the present time by far the greater proportion of conveyancing business in South Australia is still in the hands of these "land brokers" and not in those of the legal profession. Land brokers are peculiar to South Australia and there is no corresponding class of conveyancers in any of the other Australian States': *ibid.* The legal profession in Australia now supports land registration.

[85] Last paragraph of the leaflet issued by the Land Registry in August, 1946.

Any one looking at the matter dispassionately and objectively will, it is submitted, agree that:—

(1) the registered title is simpler than the unregistered, and that the registered transfer is cheaper;

(2) the purchaser of registered land does get a title in a form which is to a great extent free from legal technicalities and of which he can understand the main features;

(3) the State guarantee does in the great majority of cases afford complete security of title with, in the alternative, adequate compensation;

(4) to the average purchaser, and especially to the small purchaser, these advantages are of great value[89];

(5) registration of title should be made compulsory over the whole of England and Wales[90];

(6) land acquired by the State, local authorities, statutory undertakers, and public corporations, should be registered on acquisition in whatever area it lies, *i.e.*, without waiting for registration of title to be applied to the whole of England and Wales.[91]

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[86] They relate chiefly to (a) overriding interests, which are not entered in the register, and (b) the recording in the register of easements and restrictive covenants and, to a lesser extent, positive covenants: *Report on Surrey*, para. 17.

[87] *Report on Surrey*, para. 9 (17).

[88] *Ibid.*, para. 15 (3) and para. 17.

[89] See the conclusions reached by Mr. J. Neville Gray, Q.C., *Report on Surrey*, para. 19.

[90] *Committee on Land Utilisation in Rural Areas* (Scott Report), Cmd. 6378–1942, para. 238.

[91] See the *Report of the Land Transfer Committee*, Cmd. 6467–1943, paras. 11 and 18, where this recommendation is made as regards land acquired by the State and local authorities.

It is possible that when the register has become a National Register of Land in England and Wales it will be capable of being used as an authoritative and comprehensive record for the assessment and collection of taxation imposed on the land, in which case the development will be the very opposite of that in, *e.g.*, France and India, where a General Land Register was compiled in the first place for purposes of taxation, and subsequently was used for purposes of establishing a title to land.[92] This possible development will not be relished by many people, because it will mean, I think, that the register will be open to public search, whereas at the present time the register is absolutely private and can only be inspected by the registered proprietor and any person authorised by him, or by an order of the Court.[93] The principle of secrecy, however, is not applied to any register kept under the Land Charges Act, 1925, as any person may search in any such register on paying the prescribed fee.[94] In a recently published book dealing with law reform the recommendation is made that the register should be open to the public.[95] There is a public right of search in, *e.g.*, Australia, New Zealand, Canada (except Ontario) and South Africa, and the public is accustomed to it, but, rightly or wrongly, English people still like their property transactions to be treated as private matters. It may be, however, that should the time ever arrive for the register to be used for fiscal purposes public opinion will then be in favour of public right of search.

Only the State has the power and resources essential for the compilation and working of a National Register, and as 'Registration of title is the only method known to civilisation by which the State can secure that its chief asset, the land, may circulate among its subjects speedily, simply, cheaply, and with State-guaranteed safety'[96] it is hoped that no more time will be lost in taking all necessary steps for extending to the whole of England and Wales registration of title.

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[92] *Domesday Book* (1086–1087) was a record of landed interests in England, and was compiled because of the need for a fiscal survey for the collection of the Danegeld, and the profits of wardship, relief, forfeiture, and escheat.

[93] Land Registration Act, 1925, s. 112.

[94] Land Charges Act, 1925, s. 16.

[95] *The Reform of the Law* (1951), edited by Professor Glanville Williams, p. 101.

[96] *Registration of Title to Land* (issued by the Land Registry), para. 25.

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THE DEVELOPMENT OF LAND UNDER THE PLANNING ACTS

E. H. SCAMELL

If there is any one who feels any misgivings as to the suitability of discussing in a public lecture some of the problems which arise out of that extremely complicated legislation known under the innocent-sounding title of the Town and Country Planning Acts, then I sympathise with them and should warn them that much of what I have to say will assume some acquaintance with the general principles of that legislation. But I would add that responsibility for the present infliction must ultimately be laid at the door of Parliament which, in its wisdom, has seen fit not only to make provision governing the activities of all persons entitled to interests in land, but to do so in a language which no one can understand. Lord Mancroft, in the course of a debate on the 1952 Town and Country Planning Bill, said[1]: 'I do not wish to exaggerate; I do not wish to make any claim which I cannot substantiate on evidence; but I do believe there are people who actually understand the Town and Country Planning Acts'. I am not quite sure what Lord Mancroft meant by the word 'understand', but one thing is quite clear, and that is that if there are such people as those referred to by Lord Mancroft, they do not all 'understand' the Acts in the same way.

Over the past four-and-a-half years during which the principal Act of 1947 has been in operation, many practical difficulties have been discovered which have prevented the Act from working smoothly. The number and variety of such difficulties can be measured by a brief reference to the five volumes so far published of the *Journal of Planning Law*. What I propose to consider, however, are two broad issues which partly arise out of the proposed amendments to the Town and Country Planning Act, 1947, and which have not yet received adequate, if any, attention elsewhere. They are as follows:—

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[1] *Hansard*, Vol. 179, col. 9.

(1) What is the effect of the Planning Acts on ownership of land?

(2) What persons can (a) apply for planning permission, and (b) develop land?

THE EFFECT OF THE PLANNING ACTS ON OWNERSHIP OF LAND

1. *Before the proposed amendments.* Almost immediately after the passing of the Town and Country Planning Act, 1947, the legal profession divided itself into two camps, one of which took a radical view of the legal consequences of the Act whilst the other adopted a conservative outlook. The 'radicals', amongst whom is to be numbered the late Dr. Harold Potter,[2] took the view that the result of the restrictions imposed upon development of land by the 1947 Act, coupled with the financial provisions of that Act, was that it was no longer possible to speak with accuracy of a freehold or leasehold estate in the land, but that what an estate owner had was an estate in the *use* of land. For example, where a building was used on July 1, 1948 (the appointed day for the coming into operation of the 1947 Act) as a private dwelling house then, unless there were complications, the effect of the Act was to make the use of the building as a private dwelling house the *only* legally permitted use.[3] The building could not, after July 1, 1948, be used, for example, for business purposes unless the right so to use the building had previously been purchased from the State acting through the Central Land Board and local planning authorities. It is obvious that the *potential* uses of the building would be almost infinite, but, subject to certain minor exceptions,[4] the only use which legally existed was use as a private dwelling house. All other uses were transferred, on July 1, 1948, to the State or, in modern parlance, were nationalised. Once having arrived at this result, it was a short step to say that what the estate owner owned was an estate in the use of the building as a

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[2] See, *e.g.*, *Caveat Emptor* (1948), 13 *The Conveyancer and Real Property Lawyer*, pp. 37–49.

[3] This is the *general* effect of s. 12 (1) of the Town and Country Planning Act, 1947, but the statement is subject to exceptions not affecting the principle: see the proviso to s. 12 (2) of the Act and the Town and Country Planning General Development Order, 1950.

[4] See especially, the Town and Country Planning General Development Order, 1950.

private dwelling house. This conclusion, indeed, would arise quite naturally from the definition of ownership as 'a bundle of rights'. The principal right of the owner in the example referred to was the right to use the building as a private dwelling house *and for that purpose only;* therefore, by the process of inversion, this right would equal ownership. The only circumstances in which the building would become legally capable of being used for any other purpose would be on the purchase of another legal use from the State, and even this power to purchase another use was not part of or incidental to estate ownership, since other persons might apply to purchase such a use without the consent or knowledge of the owner.[5]

On the other hand, the 'conservatives'—spelt with a small 'c' of course—who comprised the greater part of the legal profession, regarded the new planning restrictions as merely an extension of already existing restrictions on estate ownership. They maintained that the difference between the 1947 Act and previous restrictive legislation and, indeed, common law restrictions, was one of degree only and not of kind. But the Act of 1947 effected a very considerable extension of already existing restrictions, and there comes a point where it is more accurate to define estate ownership by reference to what it *is* rather than by reference to what it is not and, on balance, I am inclined to number myself among the rather smaller ranks of the 'radicals'.

In view, however, of the proposals outlined in the White Paper published in November, 1952,[6] the opportunity for a judicial resolution of this conflict, though it still exists, has been very much reduced since the financial provisions of the 1947 Act, on which the 'radicals' based their thesis, are to be repealed and only replaced in a modified form to cover a few exceptional cases.

This White Paper was occasioned because, apart from raising the fundamental legal problem already considered, the financial provisions of the 1947 Act also gave rise to great practical difficulties and were operating, in effect, to stultify the whole Act by impeding desirable development. The theory on which the Act was based was that after the appointed day, interests in land should change hands by reference to the value of the permitted use, *i.e.*, at existing use value.[7] This theory was quite sound in principle because it would follow quite naturally from the fact that as from the appointed day, all uses of which any land was inherently capable, other than permitted uses, were vested, not in the estate owner, but in the State. It was, in effect, a measure of nationalisation similar in nature to other measures of nationalisation which have been carried through, but of a far more subtle kind. This very subtlety, in fact, was the main reason for the failure of the Act to work as intended. An owner of, say, shares in a railway company readily appreciated his loss of ownership consequent on the coming into operation of the Transport Act, 1947, for the loss was something tangible. But an estate owner could not detect any material difference in his position after as compared with before the appointed day under the 1947 Act. The result was that he tended, for the most part, to expect a price for his estate equal to the price it would have realised before the Act, and he was not deterred from realising his expectations by any really effective machinery. The only machinery contained in the Act to compel him to sell at existing use value took the form of powers of compulsory acquisition vested in the Central Land Board.[8] Where an estate owner offered to sell his interest at a price in excess of the existing use value, a prospective purchaser and intending developer of the land could ask the Central Land Board to acquire the land compulsorily for him at its existing use value. But these 'big stick' powers[9] of the Central Land Board have been exercised in comparatively few cases, the total down to March 31, 1952, being no greater than thirty-five, and this makes a remarkable contrast to the thousands of applications which were made to the Board.[10] In all these circumstances, the underlying theory of the Act simply did not work. Some owners, rather than sell their interests at existing use value, preferred to keep them, whilst others who did sell, sold for the most part at something more than the existing use value. Both results were alien to the objects of the Act, for where the estate owner refused to sell, desirable development might be held up, whilst where he sold at something more than existing use value, the cost of development was increased by virtue of the development charge which the purchaser would have to pay.[11]

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[5] *Hanily* v. *Minister of Local Government and Planning* [1952] 2 Q.B. 444.
[6] Cmd. 8699.

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[7] See the White Paper (Cmd. 8699), para. 11.

[8] Section 43 of the Town and Country Planning Act, 1947.

[9] So called by Mr. Desmond Heap in *Existing Use Value and the Purchase of Land* (1952), 5 *The Journal of Planning Law*, at p. 494.

[10] See the Annual Reports of the Central Land Board, 1949, 1950, 1951 and 1952.

With a view to remedying this state of affairs, the Government White Paper published last year sets out proposals for reform. For the purposes of the present discussion the most important of the proposals are:—

(1) To abolish development charge as regards all development commenced on or after November 18, 1952.

(2) To meet claims made on the £300 million fund for compensation for loss of development rights only if and when the sting of the loss is actually felt, *e.g.,* when planning permission is refused, or when an owner's interest in land is compulsorily acquired. But no compensation at all is to be paid where limitations on use are imposed on the principle of 'good neighbourliness'.

(3) To suspend the powers of compulsory acquisition of the Central Land Board until experience shows whether, and if so in what form, they are required.

After the experience of the past five years I do not think any one can justly feel any regrets at the passing of development charges. Even the opportunity afforded by section 85 of the Act for the courts to determine what is a charity will not be lost since 'special arrangements will be made for compensation for restrictions on . . . land of . . . charities, in respect of which no claim on the £300 million fund was admissible'.[12] The second of the proposals has received and is likely to receive censure as to its precise form, but not as to the main idea.[13]

2. *After the proposed amendments.* In the light of these proposals and of the Town and Country Planning Bill, 1952, which embodies some of them, it is necessary to reconsider the precise effect which the Town and Country Planning legislation as so amended will have on ownership of interests in land. It will undoubtedly be some considerable time before a comprehensive answer to this question will be capable of being

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[11] White Paper, paras. 11–13.

[12] *Ibid.,* para. 33.

[13] See the criticism of Sir Malcolm Trustram Eve, Q.C., in a letter to *The Times* newspaper, November 26, 1952 (reprinted in 6 *The Journal of Planning Law* (1953) pp. 6–9).

documented by references to judicial decisions, but in the meantime I would tentatively state, without undue elaboration, what I consider to be the broad solution.

It seems to me that the effect of the proposals to abolish development charge and postpone payment of claims on the £300 million fund is to denationalise all rights to develop land and revest them in the estate owner, subject to the following exceptions:—

(1) Rights to develop which have been made the subject of an unsuccessful application for planning permission. Limitations on ownership of this kind will appear from an inspection of the register kept under section 14 (5) of the 1947 Act.

(2) Rights to develop which have been granted by a planning permission which has subsequently been revoked under section 21 of the 1947 Act.

(3) Uses of land which have been made the subject of a discontinuance notice under section 26 of the 1947 Act.

(4) Uses in respect of which a value payment has been paid under section 59 of the 1947 Act.

In all these cases compensation either has been or will be paid (subject to the principle of 'good neighbourliness' and, where required, the holding of an admitted claim on the £300 million fund), and the ownership in such development rights or uses is, as before, vested in the State. Although it is highly unlikely in most cases that any of these uses will be disposed of by the State, nevertheless it is impossible to foretell what kind of development may in the future be desirable and accordingly it is proposed to make statutory provision for the sale, where appropriate, of such uses to developers.[14] To some extent, therefore, development charge is to continue in an attenuated form, but presumably, in view of the wording of clause 1 (1) of the Town and Country Planning Bill, 1952, under a new name.

Apart from these *exceptional* uses and development rights, it would seem that all others of which the land is inherently capable are vested in the estate owner for the time being, though except in the case of permitted uses, their exercise is subject to the obtaining of planning permission. These uses or development rights will, when Development Plans have been completed, fall into two classes:—

[14] White Paper, para. 44.

(1) Those which are inconsistent with the Development Plan.

(2) Those which are not inconsistent with the Development Plan.

(1) With regard to uses which are inconsistent with the Development Plan and which are not permitted uses, their position appears to be somewhat akin to the position of land which has been designated for compulsory acquisition in a Development Plan under section 5 (2) of the 1947 Act. That is to say, it is likely that such uses will, on an application for planning permission to exploit them being bona fide made, be compulsorily acquired, subject to the payment of compensation where an admitted claim exists, unless the land ought not, on the principle of 'good neighbourliness' to be put to such uses. An example will illustrate these propositions. Suppose that A is the owner of an interest in a vacant site adjoining a housing estate and that the site is within an area which is allocated by the Development Plan for use for agricultural purposes. The effect of the above thesis is that A's ownership comprises not only the right to put the land to its permitted use—whatever that might be—but also the right to use it for any other purpose of which it is capable, subject, of course, to the obtaining of planning permission. But the effect of the allocation of this plot of land for agricultural purposes only in the Development Plan is to render it extremely unlikely that planning permission will be forthcoming to enable the plot to be used for any other than agricultural purposes. Thus, if A bona fide applies for planning permission to erect a house on the plot, the likelihood is that the application would be refused. The result of such refusal is that the right to use the plot for housing purposes is compulsorily acquired by the State and this then gives rise to the obligation of the State to pay compensation in respect of the acquisition, provided that A (or some other person) holds a claim on the £300 million fund and assuming that the refusal to grant planning permission is not based upon the principle of 'good neighbourliness'—whatever that might mean.[15]

(2) The second class of uses comprises those which are not

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[15] The meaning of 'good neighbourliness' is considered by Mr. W. A. Leach in *Studies of the White Paper* (1953), 6 *The Journal of Planning Law*, pp. 19–27.

inconsistent with the Development Plan. In the case of these uses there is a likelihood, but no more than a likelihood, that an application to exploit one or more of them will be granted and, if granted, no payment of any kind will fall to be made.[16]

From what has been said it will appear that under the new proposals an estate owner owns not only those uses in the land which are currently permitted, but also all other uses of which the land is inherently capable, subject to the liability of the former to be compulsorily acquired by the service of a discontinuance notice, and of the latter to be compulsorily acquired on a refusal of an application for planning permission.

I have laboured this question as to the character of the change to be brought about by impending changes in the law because I believe an answer to it to be fundamental and to constitute the key to a number of important practical problems, such as what are matters of title, which I cannot embark upon here.

WHAT PERSONS CAN (1) APPLY FOR PLANNING PERMISSION AND (2) DEVELOP?

1. *Who can apply for Planning Permission?* It might have been thought that since fourteen sections of the 1947 Act are devoted exclusively to the subject of 'Permission to Develop Land',[17] provision would be found as to who were the persons entitled to apply for such permission; but this is not the case. Prima facie it might then have been thought that the right to apply for planning permission was a right exclusively incidental to ownership; but the Act tends to think in terms of *developers* rather than *owners,*[18] and it is therefore not surprising to find that a practice grew up of persons who had no legal or equitable interest in the land, applying for and being granted planning permissions.[19] The propriety of this practice was put on test before Parker, J., in *Hanily* v. *Minister of Local Government and Planning,*[20] where it was confirmed subject to certain

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[16] White Paper, paras. 30 and 31.

[17] Sections 12–25.

[18] See, *e.g.*, ss. 16 (1), 17 (1) and 24 (2).

[19] See the *Memorandum of the Royal Institution of Chartered Surveyors* on the Town and Country Planning Act, 1947, para. 154.

[20] [1952] 2 Q.B. 444.

limitations.[21] In giving judgment, Parker, J., said: 'There is, however, in my view, nothing in Part III of the Act providing expressly or even impliedly that the applicant must be the owner or somebody applying with the owner's consent. It seems to me that under Part III of this Act anybody who genuinely hopes to acquire the interest in the land can properly apply for planning permission'. The result is that an intending purchaser of an interest in land can apply for and (if successful) obtain planning permission'. The result is that an intending purchaser of an whose estate is affected. It is interesting to speculate on the possibilities of this where an interest in land, inherently suitable for development, is offered for sale by auction. Presumably each intending bidder could apply for planning permission and each obtain permission to carry out different kinds of development! But what is certain is that if the decision of Parker, J., is correct, it will have serious consequences on the position of the estate owner,[22] particularly where planning permission is refused. The following repercussions may be mentioned:—

(1) Where the application for planning permission made by a third party is refused then:

- (a) This will be noted in the register of applications for planning permission kept by the local planning authority[23] and may therefore operate to deter other prospective purchasers.
- (b) Compensation may become payable either under section 20 of the 1947 Act or under the new financial provisions[24] without the person entitled to claim becoming aware of it for, as has been pointed out,[25] 'a landowner cannot be daily searching registers'. This gives rise to the problem as to when time will start to run against such a person under the Limitation Act, 1939.

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[21] In fact, assuming that a firm contract existed between Mrs. Hanily and Mr. Terry, it *may* be that the whole proceedings were ill-conceived; cf. *Hillingdon Estates Co.* v. *Stonefield Estates Ltd.* [1952] Ch. 627. But the facts are not now likely to be repeated.

[22] See various letters to the Editor of *The Journal of Planning Law* (Vol. 6, 1952), and an article by Mr. Desmond Heap, *ibid.*, at pp. 495–497.

[23] Under s. 14 (5) of the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order, 1950, para. 12.

[24] See para. 28 of the White Paper and clause 2 (1) of the Town and Country Planning Bill, 1952.

[25] By J. W. G. Heaven in a letter published in 5 *The Journal of Planning Law* (1952), p. 575.

(c) Where the result of the refusal of the planning permission is to render the land incapable of reasonably beneficial use, the estate owner may have the right to serve on the local authority a purchase notice under section 19 (1) of the 1947 Act requiring his interest to be compulsorily acquired. Such a notice must be served within a period of six months from the date of the refusal of planning permission unless the Minister of Housing and Local Government extends this period.[26] This right may therefore be lost by reason of the owner's absence of knowledge of the refusal of planning permission.

(d) The right of appealing to the Minister against a refusal of a local planning authority to grant planning permission is exercisable only by the *applicant*,[27] so that if the third party does not exercise the right, the estate owner is powerless to do anything even assuming that he knows of the refusal.

(2) Where the application for planning permission by the third party is granted, then the disadvantages to the estate owner may be less serious, though this will to some extent depend upon the answer which the courts give to the question as to the effect of the grant of a planning permission on the existing use, for if section 18 (4) applies to the grant of *all* planning permissions, whether beneficial or not, the grant might be detrimental.

It clearly appears, therefore, that the power of persons who have no legal or equitable interest in the land to apply for planning permission without the consent or knowledge of the owner is most objectionable. It may be that it would not be desirable to remove such a power completely,[28] but its worst consequences could be overcome by a short statutory provision to the effect that no person may apply for planning permission without first obtaining the consent (not to be unreasonably withheld) of [29] the 'owner' as defined in section 119 (1) of the 1947 Act. Furthermore, section 16 (1) of the Act which deals with appeals against the refusal of planning permission, should be amended so as to give at least the 'owner' of the land the right to appeal where the applicant refuses to lodge an appeal himself.

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[26] Town and Country Planning (General) Regulations, 1948, para. 4.
[27] Section 16 (1) Town and Country Planning Act, 1947.
[28] See the White Paper, para. 31.
[29] Or, possibly, serving notice on.

2. *Who can develop land?* This question is, I think, likely to produce a crop of decisions before the Acts have been in operation many more years. The answer may be bound up with the problem just considered as to who can apply for planning permission (which I have not attempted to exhaust), but in the absence of authority this is not certain and I prefer to deal with it as a separate problem on the assumption that planning permission is either not required[30] or has been obtained. The question which arises in these circumstances is what constitutes a sufficient interest to enable a person to develop land? Clearly no problem will arise in the case of a fee simple owner who is solely and beneficially entitled, but the problem does present itself in an acute form where a lessee, a tenant for life under the Settled Land Act, 1925, or trustees for sale are concerned. The Act is completely silent on this issue and it is therefore necessary to fall back on common law principles. In the case of leases, settlements and express trusts for sale created after the coming into operation of the Act of 1947, the matter can and should be dealt with expressly, and a volume of valuable precedents has already been published to cater for such cases.[31] Many conveyancers, however, will no doubt continue to adopt the view that no fundamental change has been brought about by the new planning legislation, and the problem is therefore likely to arise even under newly created leases and trusts as well as under informally created leases and settlements and statutory trusts for sale.

(1) *Lessee.* I will take the position of a lessee first. The question is, in what circumstances, if any, can a lessee carry out 'development' on the land within the meaning of section 12 (2) of the Town and Country Planning Act, 1947? One thing seems reasonably clear and that is that for a lessee to carry out development *in contravention* of the Act will constitute waste by reason of the damage caused to the inheritance by the sanctions imposed for contraventions in the Act.[32] Apart from

[30] Under the provisions of the Town and Country Planning General Development Order, 1950.

[31] Potter and McIntyre, *Precedents and Planning* (1950).

[32] See ss. 23 (1) and 24; Potter, *Dealings with Land under the Planning Acts* (1948), 2 *The Journal of Planning Law*, at p. 359; 3 *ibid.*, (1950), at pp. 339–340.

this, the late lamented Dr. Harold Potter expressed the opinion, in 1950, that 'The power to develop will depend upon the terms of the lease. Apart from any special terms it would seem that a lessee can apply for any planning permission and can carry it out (subject to the terms of any sub-lease)'.[33] Whilst agreeing with the first proposition, I would respectfully disagree with the second. It seems to me that the power of a lessee to develop the land is conditioned by the doctrine of waste. The position of a tenant for years at common law is that he is liable for voluntary waste and possibly also for permissive waste but this was expressly left undecided in *Yellowly* v. *Gower*.[34] Leaving aside, therefore, the lessee's doubtful liability for permissive waste, his liability for voluntary waste is not to do any positive act which is destructive of or alters the character of the property.[35] There are certain well-recognised categories of such acts such as pulling down or damaging buildings, cutting timber, opening mines or quarries and possibly changing the course of husbandry, and it is clear that a tenant for years will in this respect be in no different position now from what he was in before the Act of 1947. But in addition to these well-recognised categories of waste, it is my submission that the Act of 1947 has itself created a new category falling within the general principle, *viz.*, the carrying out of certain kinds of development, including a mere change of use on the land, pursuant to a perpetual planning permission. This submission is based upon the assumption that once a perpetual planning permission has been obtained and the development carried out, then to the extent to which the new use is inconsistent with the former use, the former use has become an unauthorised use and itself requires further planning permission for its resumption.[36]

To take an illustration which will give rise to the problem, suppose A owns the fee simple in Greenacre, the permitted use of which is use as a car park. Suppose further that before 1948 A granted a lease of Greenacre to B for a term of twenty-one years, the lease containing no covenant on the part of B to continue the use of Greenacre as a car park. If at any time after July 1, 1948, B applies for and obtains a perpetual planning permission to change the use of the property from that of a car park to that of a garden to be enjoyed with adjoining property,[37] and if B actually institutes this new use, it is submitted that this 'development' would constitute waste although apart from the 1947 Act, this would not be so. The reason is that on the expiration or earlier determination of the lease, the owner of the freehold, A, could only resume the use of Greenacre as a car park if he obtained planning permission to do so, and such permission might well not be forthcoming on the principle that the local planning authority would undoubtedly be loath to allow switching backwards and forwards. But in any case, the mere *risk* of refusal of permission may be sufficient to render B's development waste, as will appear from a case which I shall be considering in a moment. It follows that damage has been caused to the inheritance and, prima facie, an action in damages for waste would lie or, before the change in use had become effective and binding, an action for an injunction. A somewhat parallel case on different statutory provisions was *West Ham Charity Board* v. *East London Water Works Co.*[38] This was a case in which, under a lease of 1830, twelve acres of meadow land were demised to the Water Works for ninety-nine years at a rent of £70 per annum. In 1896, when the lease still had thirty-three years to run, the Water Works Company subdemised the land to one Base for the remainder of the term less the last three days thereof at a rent of £105 per annum, as a rubbish shoot. Base took possession and shot large quantities of hard and soft rubbish including dust bin refuse, vegetable matter and other miscellaneous rubbish. The result, after a period, was that the surface of the meadow was raised about ten feet. The plaintiffs, who were the successors in title of the original lessor, claimed that the acts of Base constituted waste for which the defendant company was liable. It was held by Buckley, J. (afterwards L.J.) that the deposit of this rubbish had altered the nature of the thing demised so that the reversioners would get back something different from what had been granted, and that this amounted to waste irrespective of whether or not there was any possible benefit to the reversion. Buckley, J., further went on to hold that the demised property could be regarded as having been altered in nature in any one of three ways, and it is the second of these which is in point for the purposes of the present discussion. His Lordship said: 'The local authority has a right under section 25 of the Public Health Act, 1890, to forbid dwellings to be put on land if the land be impregnated with fæcal, animal or vegetable matter. Why am I to expose the reversioner to the possibility of finding himself unable to build upon the land because of the deposit of this material upon it? The property demised is altered. You have new conditions to comply with before you can use it in the way you could have used it before. It appears to me that that is such an alteration, and I need not say that the landowner ought not to be excluded from the opportunity of building cottages upon the land if he is so minded, although the land would be much more valuable for factories'. And further on in his judgment his Lordship went on to ask: 'Why should not the plaintiffs have that which they are entitled to under the lease of 1830, namely, the land as it stood in 1830, sown with grass seeds, with an opportunity for the reversioners to do what they will with it?'

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[33] 3 *The Journal of Planning Law* (1950), at p. 340.

[34] (1855) 24 L.J.Ex. 289.

[35] *Lord Darcy* v. *Askwith* (1618) Hobart 234.

[36] This would seem to be the generally accepted view: see Potter, *Conveyancing under the Planning Acts* (1950), 3 *The Journal of Planning Law*, pp. 807–810; Leach, *Changes of Use and Property Managers*, *ibid.*, pp. 744–746.

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[37] Cf. *Sampson's Executors* v. *Nottingham County Council* [1949] 2 K.B. 439.

[38] [1900] 1 Ch. 624.

It may be that this case covers a good deal more ground than is covered by my present contention, since it would seem to deny the availability of the equitable defence of 'ameliorating waste' which might be pleaded where, for example, a tenant for years develops the land in a way which enhances the value of the reversion. But it does, I think, go sufficiently far to establish strong grounds for arguing that where a change of use is effected or threatened by a tenant for years, with planning permission which is not confined to the period of his leasehold interest, and results in damage to the inheritance, then such action or threatened action constitutes waste remediable by injunction and/or damages.

If this is the law, then clearly amendment is required for otherwise development of certain kinds may not be possible where there is a leasehold interest in the land. At the same time, the freehold estate owner must be protected from encroachment on his powers of ownership when the lease determines. A similar problem arose in a less complex form in connection with the proposals for restricting the use of certain land in London and the Home Counties so as to provide the 'Green Belt', and was adequately dealt with by express provision in the Green Belt Act, 1938. Under this Act, any owner of a legal fee simple or term for more than twenty-one years can covenant with the local authority or make a declaration to restrict the user of such land.[39] But it is expressly provided in section 14 of the Act that, 'Where by reason only of a declaration[40] made by a lessee for a term of years the provisions of this Act apply to any land those provisions shall cease to apply to that land on the expiration or earlier determination of that term'. It seems to have been overlooked by the framers of the Town and Country Planning Act that a change of use carried out with planning permission by a lessee can have an effect equally as restrictive as declarations to restrict the user of land made under the Green Belt Act, 1938.[41] This is so because on a change of use, the old use is extinguished to the extent to which it is inconsistent with the new use.[42] It may be difficult to provide a simple and just solution to the more complex problem which arises under the Town and Country Planning Act, for whilst some 'developments' could conveniently be authorised for the duration of the lessee's interest in the land, it would be impracticable to limit all development in that way, particularly where demolition or constructional work is concerned. Unless, however, the problem receives attention from the Legislature, it cannot be long before it will receive attention from the courts.

(2) *Tenant for life under the Settled Land Act, 1925.* When a vesting instrument is executed vesting the legal estate in the settled land in the tenant for life, the effect is to constitute the tenant for life a *trustee* of the legal estate for all the persons, including himself, entitled under the settlement.[43] Having declared the tenant for life to be a trustee, the Settled Land Act then gives him certain powers of dealing with the land itself, that is, the *physical* land (as opposed to the legal estate in the

[39] Green Belt Act, 1938, s. 3 (*a*).

[40] There was no need for any express provision in the case of a covenant since its operation must necessarily be confined to the period of the lease.

[41] Similarly, it is assumed in s. 18 (4) of the Town and Country Planning Act, 1947, that all planning permissions must be *beneficial*.

[42] See note 36, *supra.*

[43] Settled Land Act, 1925, s. 16 (1).

land), *viz.*, power under Part IV of the Act to carry out certain authorised improvements on the settled property, and power under section 66 of the Act to cut timber in certain circumstances. Apart from these powers, however, there is nothing in the Settled Land Act which expressly entitles the tenant for life to do anything else on the land, so that all other powers which he may have over the land are derived from and conditioned by his trusteeship of the legal estate and the size of his beneficial interest. It is therefore necessary in considering the impact of the Town and Country Planning Acts on 'development' by a tenant for life, to distinguish between those powers to develop the land which are statutory and those which are not.

First, in so far as the Settled Land Act confers power on the tenant for life to carry out certain specified improvements on the settled land,[44] it would seem that apart from the additional burdens and limitations which the Town and Country Planning legislation imposes, development is not impeded.[45] The same seems to apply to the tenant for life's power to cut timber under section 66 of the Settled Land Act, though this power may, of course, be circumscribed by a tree preservation order.[46] No special problems seem to arise in either of these cases.

When, however, attention is directed to the tenant for life's non-statutory powers of managing the settled land, entirely different considerations apply and it would seem that considerable limitations have been imposed on the exercise of such powers by the operation of the Planning Acts similar to those considered earlier in relation to a lessee's powers. A hypothetical case will serve to illustrate the problem involved. Suppose that A is entitled to a life interest in a fried fish shop and that a vesting instrument has been executed in his favour. If for any reason the business of purveyor of fish and chips is repugnant to A he could, before July 1, 1948, change the use of the premises so as to carry on a more congenial trade and, provided he made no structural alterations, he would incur no liability under the settlement. No damage would be done to anybody since on the termination of A's life interest the person next entitled under the settlement could resume the business of fish frying. The position after July 1, 1948, however, is somewhat different. As far as the planning authorities are concerned, A needs no specific planning permission to change the use of the premises from a fried fish shop to a different kind of shop, since such a change is authorised by general planning permission.[47] But the converse does not hold good and planning permission *is* required in order to resume the use of the premises as a fried fish shop.[48] That being so, the effect of A discontinuing the fish and chip trade and starting up in some other trade automatically creates a restriction on the remainderman since on the termination of A's life interest, the remainderman will not be able to engage in the fried fish trade unless planning permission is forthcoming. It may well follow from this that the act of the tenant for life, A, in changing the use of the shop premises, constitutes waste, since the result is to change the nature of the inheritance.[49] If this is so[50] then the power of a tenant for life to 'develop' the settled land may depend upon his liability for waste as a beneficiary in equity, and although it has been the favoured practice in modern settlements and resettlements to make tenants for life expressly unimpeachable for waste, this has not been a universal practice and no such exemption is usually conferred, by the nature of things, where a settlement comes into existence informally, *inter vivos,* or under a holograph will.

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[44] See Part 4 and the Third Schedule of the Settled Land Act, 1925.

[45] See Potter, *Dealings with Land under the Planning Acts*, 3 *The Journal of Planning Law* (1950), p. 615, at p. 617.

[46] Made under s. 28 of the Town and Country Planning Act, 1947.

It is not, of course, every 'development' which will constitute waste. First, there are developments which simply add a further permitted use to the estate without extinguishing the existing use. Clearly, such developments will not constitute waste where they would not have done so before July 1, 1948, since no *restriction* on the inheritance results from the development. Secondly, with many developments, the result will be to *increase* the value of the inheritance and to that extent, such developments may fall within the equitable principle of ameliorating waste.[51]

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[47] Town and Country Planning General Development Order, 1950, para. 3 and the First Schedule, Part 1, Class 3.

[48] Unless the shop is at the time used as a tripe shop, pet shop or cats-meat shop: *loc. cit.*

[49] Cf. *West Ham Charity Board* v. *East London Water Works Co.* [1900] 1 Ch. 624, considered above at pp. 144–145.

[50] It was the opinion of Dr. Potter, expressed in 1 *The Journal of Planning Law* (1948), at p. 554.

[51] Cf. *Meux* v. *Cobley* [1892] 2 Ch. 253.

In view of the decision in *West Ham Charity Board* v. *East London Water Works Co.*,[52] however, this is not certain, since even though the inheritance is enhanced in value, it is at the same time *restricted* in so far as the former use cannot be resumed without planning permission. For the avoidance of all doubts, express statutory provision is called for to deal with cases where a tenant for life is impeachable for waste, authorising him, on compliance with the requirements of the Planning Acts, to carry out any kind of 'development' on the settled land which he could have carried out immediately before July 1, 1948. But for the protection of remaindermen, it is suggested that the tenant for life should be required, before carrying out any such developments, to obtain the consent either of the trustees or the Court.[53]

(3) *Trustees for sale.* Here, too, a curtailment of the powers of management would seem to have taken place as a result of the Planning Acts. By virtue of section 28 (1) of the Law of Property Act, 1925, and section 102 (2) of the Settled Land Act, 1925, trustees for sale must not, in exercising their powers of management, do any act which if done by the beneficiary entitled in possession in the proceeds of sale would render him liable for waste. If the submissions which I have made earlier are accepted, it is clear that since the Town and Country Planning Acts have widened the scope of the doctrine of waste, they have correspondingly reduced the scope of the powers of management of trustees for sale. Lack of time prohibits me from elaborating upon this proposition, but the problem is equally as acute as in the case of lessees for years and tenants for life, and if the idea behind the planning legislation is not to operate in reverse, statutory amendment is again required, and the lines which it might take are again suggested by the Green Belt Act, 1938.[54]

CONCLUSION

In keeping this lecture within predetermined bounds it has only been possible to look at a few even of those problems which are of a more general character. Others equally as pressing are known to exist, and still others will float to the surface with the passing of time. Many of the difficulties which arise are to some extent due to the fact that the legislation was framed with too little regard for the legal consequences. This immediately places it at a serious disadvantage when it seeks, as it must, to engraft itself on to the existing law. The common law has been built up out of disputes arising between individuals, and in these circumstances any social legislation should, if it is to succeed, have the closest regard for its effect on individuals. To the extent to which the planning legislation has turned a blind eye to such consequences, there is the danger that common law principles will rear their individualistic heads in defiance of the social plan.

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[52] *Vide supra*, p. 145.

[53] See the parallel safeguard provided to meet a somewhat similar situation in the Green Belt Act, 1938, s. 19 (1).

[54] See, especially, s. 19 (1) (*b*).

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THE FAILURE OF THE ASTOR TRUST

O. R. Marshall

The decision in *Re Astor's Settlement Trusts*[1] (which I shall refer to as *The Astor Trust*) has intensified the doubts which exist concerning the validity of non-charitable purpose trusts. It is the object of this paper to examine the reasons which have been put forward against the existence of these trusts.[2]

1. A TRUST FAILS FOR LACK OF SOMEONE TO ENFORCE IT

It will at this point be convenient to examine the *Astor Trust*. In February, 1945, the late Lord Astor settled substantially all the issued shares of the Observer Ltd., the proprietors of the *Observer* and other newspapers upon trust to apply the income during a specified period not obnoxious to the rule against perpetuities for all or any of a number of public but non-charitable purposes, such application to be at the discretion of the trustees, but subject to the direction of the settlors. At the expiration of the period the trust funds were to be held upon trust for a person not yet ascertainable absolutely and beneficially. The objects and purposes for which the income was to be applied included the improvement of good understanding between nations, the preservation of the independence and integrity of newspapers, the promotion of the freedom, independence and integrity of the Press, the publication or management of newspapers, the protection of newspapers (particularly country or provincial newspapers) from being absorbed by combines, the restoration and maintenance of the independence of the editors of and writers in newspapers, the securing for the public of means of ascertaining by whom any newspaper is actually owned or controlled, and the establishment of any charitable public or benevolent schemes for the (1) improvement of newspapers or journalism or (2) the relief of persons or their families actually or formerly engaged in journalism or in the newspaper business or any branch thereof, or (3) for any of the objects previously mentioned. Some time after this settlement it was pointed out to Lord Astor that the trusts of income during the specified period might be void and that the trust at the end of the specified period would fail if the ultimate beneficiary could not then be ascertained. On August 20, 1951, Lord Astor settled upon charitable trusts any beneficial interest which he might have in the trust funds settled by the 1945 settlement in the event of that settlement being held void. Roxburgh, J., confirmed the apprehension felt by Lord Astor's advisers as to the validity of the 1945 trust by holding it to be void. He did so for two reasons, first because there was no individual who could enforce performance of the trust and secondly because the trusts were too vague and indefinite to be enforced. It is with the first reason that I am concerned in this section. Roxburgh, J., began by pointing out that equitable rights were hammered out in the process of litigation and that consequently one would not expect a trustee to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, the nature and extent of which would be worked out in proceedings for enforcement. He then went on to show how the exception in favour of charity grew up and pointed out that the Attorney-General was charged with the duty of taking the necessary proceedings to secure the performance of charitable trusts. He continued,[3] 'But if the purposes are not charitable, great difficulties do arise both in theory and in practice. In theory because having regard to the historical origins of equity, it is difficult to visualise the growth of equitable obligations which nobody can enforce, and in

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[1] [1952] 1 All E.R. 1067.

[2] For reference see generally Scott, *Trusts for Charitable and Benevolent Purposes* (1945), 58 *Harvard Law Review*, p. 548; Ames, *The Failure of The Tilden Trust* (1892), 5 *Harvard Law Review*, p. 389; Gray, *Gifts for a Non-Charitable Purpose* (1902), 15 *Harvard Law Review*, p. 509; *Rule Against Perpetuities* (4th ed.), App. H; *Scott on Trusts*, Vol. 1, ss. 119–124; *Restatement of Trusts*, ss. 119–124; Sweet, *Restraints on Alienation* (1917), 33 *Law Quarterly Review*, p. 342; Hart, *Some Reflections on Re Chardon* (1937), 53 *Law Quarterly Review*, p. 24; Albery, *Some Further Reflections on Re Chardon* (1938), 54 *Law Quarterly Review*, p. 258; Glanville Williams, *The Three Certainties* (1940), 4 *Modern Law Review*, p. 20; Egglestone, *Purpose Trusts*, 2 *Res Judicatae*, pp. 118–124; Clark, *Unenforcible Trusts and the Rule against Perpetuities* (1911), 10 *Michigan Law Review*, p. 31; Smith, *Honorary Trusts and the Rule against Perpetuities* (1930), 30 *Columbia Law Review*, p. 60; Lloyd, *Law of Unincorporated Associations* (1938); L. A. Sheridan, *Trusts for non-charitable purposes* (1953), 17 *The Conveyancer*, p. 46.

[3] [1952] 1 All E.R. 1067, at p. 1071.

practice because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control or, in the case of maladministration reform . . . Moreover [this view] gains no little support from the practical considerations that no officer has ever been constituted to take, in the case of non-charitable purposes, the position held by the Attorney-General in connection with charitable purposes, and no case has been found in the reports in which the Court has ever directly enforced a non-charitable purpose against a trustee. Indeed, where, as in the present case, the only beneficiaries are purposes and an at present unascertainable person, it is difficult to see who could initiate such proceedings. If the purposes are valid trusts the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed ex parte to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trusts against them. This point is, in my judgment, of importance because, in most of the cases . . . , the Court had indirect means of enforcing the execution of the non-charitable purpose'. Roxburgh, J., then went on to consider a group of cases[4] relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts had upheld as valid, trusts which were not directly enforceable by the beneficiaries. The courts had achieved this result by requiring an undertaking from the trustee that he would carry out the trust, and by giving the residuary legatees, who would have been entitled to the legacy but for the trust for its application, liberty to apply to the Court to prevent any misapplication or breach of the undertaking given by the trustee. He considered these cases to be anomalous and in no way destructive of the general principle that 'a gift on trust must have a *cestui que trust*'.[5] Perhaps they could be justified as concessions to human weakness or sentiment.[6] He also considered *Re Thompson*,[7] a case which related to the furtherance of fox-hunting and not to the maintenance of specific animals or tombs, but concluded that it laid down no general proposition and was expressly founded on the tomb and animal cases. He accordingly concluded that the *Astor Trust* was void for lack of somebody to enforce it.

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[4] *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176; *Mitford* v. *Reynolds* (1848) 16 Sim. 105; *Re Dean* (1889) 41 Ch.D. 552; *Pirbright* v. *Salwey* [1896] W.N. 86 and *Re Hooper* [1932] 1 Ch. 38.

[5] *Per* Harman, J., in *Re Wood* [1949] 1 All E.R. 1100, at p. 1101.

[6] [1952] 1 All E.R. 1067, at p. 1074 adopting Underhill's *Law of Trusts and Trustees* (8th ed.), p. 79 (now 10th ed., p. 97).

[7] [1934] Ch. 342.

It is suggested with respect that Roxburgh, J.'s decision on this aspect of the case is not satisfactory. In the first place his view that in the event of the *Astor Trust* being held valid the settlors would have retained no beneficial interest which would have enabled them to take proceedings for the enforcement of the trust is clearly wrong. If correct, it would mean that in the tomb and animal trusts (which were held valid) the testator would have retained no beneficial interest and so no beneficial interest could have devolved on his residuary legatee—*nemo dare potest quod non habet*. Yet it is precisely the interest of the residuary legatees in the tomb and animal cases which enables them to apply to the Court in case of breach of duty by the trustee, and which gives enforceability to what at first sight appears an unenforceable trust. The truth of the matter is that there is no distinction between wills and deeds in this respect. If the residuary legatees had an interest in the tomb and animal cases sufficient to enable them to take enforcement proceedings, the settlor in the *Astor Trust* also had a sufficient interest for this purpose since whatever he had not effectively disposed of by the deed would revert to him by way of resulting trust, including the right to take proceedings for the enforcement of the trust. It might be argued that the *Astor Trust* did not fall within the principles of the tomb and animal cases because of the presence in it of a gift over—a factor which was absent from the tomb and animal cases. But the argument is unconvincing since the gift over was limited to take effect at a specified future date and there was nothing to prevent a resulting trust in the meantime. In the second place, Roxburgh, J.'s view that the exception to the requirement of a beneficiary is limited to tomb and animal cases, and cases which have been expressly founded on them is open to question. First, because North, J., in *Re Dean*[8] did not limit his observations in this way. He said: 'Then it is said, that there is no *cestui que* trust who can enforce the trust, and that the Court will not recognise a trust unless it is capable of being enforced by someone. I do not assent to that view'. Roxburgh, J.'s treatment of this unqualified view of North, J., is unconvincing. 'Putting it at its highest', he says,[9] 'North, J., merely held that there were certainly classes of trust, of which this was one, in which that objection was not fatal. He did not suggest that it was not generally fatal outside the realm of charity'. Secondly, if *Re Thompson*[10] which is not a tomb and animal case is good because it is expressly founded on the tomb and animal cases and because it was possible to make such an order as was made in those cases, why should the *Astor Trust* be bad when, if the purposes had been definite, such an order would appear to have been possible? Thirdly, the decision in *Gott* v. *Nairne*[11] was overlooked, and this case was not concerned with tombs or animals. In that case there was a bequest of £12,000 to trustees on trust at their discretion to buy an advowson and nominate to it such person as they should think proper. Subject to this trust the advowson was to be held in trust for A until he should have a benefice worth £1,000 a year or died. Until the advowson was bought the fund was to accumulate and at the end of twenty-one years or at A's death or on his being presented to a benefice worth £1,000 a year, the fund was to belong to A, his executors, etc. The fund accumulated for twelve years. No advowson had been purchased, but the trustees did not desire to renounce the trust. Under the rule in *Saunders* v. *Vautier*,[12] which gives a *cestui que* trust who is *sui juris* and has the entire beneficial interest the right to have a transfer of the legal interest, A claimed to have the fund transferred to him. The bill was dismissed on the ground that A had not the exclusive beneficial interest; for the trustees though not compellable were yet at liberty to nominate some person other than A. Hall, V.C., after remarking that the trustees disclaimed any beneficial interest and desired to perform the trust, held that the trustees should be allowed to carry out the trust.[13] This decision seems to accord with principle. The trustee is empowered to act, and the settlor clearly intended that he should act. Why then prevent him from acting if he is willing to do so on the ground that he cannot be compelled to act if he is unwilling? In the words of Ames,[14] 'The only objection that has ever been urged against such a gift is that the Court cannot compel the trustee to act if he is unwilling. Is it not a monstrous *non sequitur* to say that therefore the Court will not permit him to act where he is willing?' Gray,[15] on the other hand, argues that the law will not allow a man to create a situation where the legal title is in A and the beneficial interest is in no one. An attempt to impose a legal or equitable duty is void unless it confers a correlative legal or equitable right. For Ames therefore such trusts are good in principle; for Gray they are bad. Roxburgh, J., gets the worst of both worlds by holding them to be bad in principle but valid as exceptions to the general rule. An exception which is bad in principle is undesirable, but it becomes even more so when no satisfactory limits are suggested within which to confine it.

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[8] (1889) 41 Ch.D. 552, at p. 556.

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[9] [1952] 1 All E.R. 1067, at p. 1073.
[10] [1934] Ch. 342.
[11] (1876) 3 Ch.D. 278.
[12] (1841) 4 Beav. 115.
[13] (1876) 3 Ch.D. 278, at p. 284.

2. A TRUST FAILS IF ITS OBJECTS ARE VAGUE, INDEFINITE OR UNCERTAIN

This was the second ground on which Roxburgh, J., held the *Astor Trust* to be void. He said,[16] 'If (contrary to my view) an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, the purposes must, in my judgment, be stated in phrases which embody definite concepts, and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty'. Applying this test to the facts of the case he found that there were many uncertain phrases used in the enumeration of the purposes, and concluded that as a result the whole trust was void inasmuch as the Court could not sever the uncertain from the certain since this would be rewriting the trust for the settlor which the Court had no power to do. In reply to the suggestion that the trustees could apply to the Court ex parte for a scheme, he said,[17] 'It is not, I think, a mere coincidence that no case has been found outside the realm of charity in which the

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[14] *The Failure of The 'Tilden Trust'* (1892), 5 *Harvard Law Review*, p. 389, at p. 395.

[15] *Gifts for a non-charitable purpose* (1902), 15 *Harvard Law Review*, p. 509; *Rule against Perpetuities* (3rd ed., 1915), App. H; cf. 4th ed., § 909.

[16] [1952] 1 All E.R. 1067, at pp. 1074–1075.

[17] *Ibid.*, at p. 1075.

Court has yet devised a scheme of ways and means for attaining enumerated trust purposes. If it were to assume this (as I think) novel jurisdiction over public, but not charitable, trusts, it would, I believe, necessarily require the assistance of a custodian of the public interest analogous to the Attorney-General in charity cases who would not only help to formulate schemes but could be charged with the duty of enforcing them and preventing maladministration. There is no such person. Accordingly, in my judgment the trusts for the application of income during "the specified period" are void also for uncertainty. But while I have reached my decision on two separate grounds, both, I think, have their origin in a single principle, namely, that a court of equity does not recognise as valid a trust which it cannot both enforce and control. This seems to me to be good equity and good sense'. It will be apparent from this that Roxburgh, J., recognises the possibility of valid non-charitable purpose trusts, though he does not approve of their existence. 'If', he says,[18] '(*contrary to my view*) an enumeration of purposes can take the place of an enumeration of beneficiaries, the purposes must be stated in phrases which embody definite concepts'. The lack of a beneficiary, therefore, is generally fatal, but it can be cured either by a gift to charity or, according to *Re Thompson*[19] and *Gott* v. *Nairne*[20] but contrary to the views of Harman, J., in *Re Wood*[21] and Roxburgh, J., in the *Astor Trust*,[22] by a gift on trust for purposes which are sufficiently definite. Roxburgh, J.'s doubt about the existence of non-charitable trusts for definite purposes is supported by that of Harman, J., in *Re Wood*.[23] 'A gift on trust', said Harman, J., 'must have a *cestui que* trust'. The requirement that there should be a beneficiary is for them fundamental. If there is no beneficiary there can be no trust since there is no one who can take proceedings to enforce it. The tomb and animal cases are exceptions to the general rule justifiable if at all as a concession to human weakness and sentiment; *Re Thompson*,[24] the trust for the promotion of fox-hunting, extends the exception and is justifiable if at all as a concession to the sporting instincts of the Englishman. The attempt to justify the tomb and animal cases on the ground that they are indirectly enforceable at the suit of persons who are entitled to property which the settlor has not effectively given away would be a justification for upholding all definite purpose trusts. Roxburgh, J., in fact attempts to limit this justification to the tomb and animal cases, but the limitation is illogical as has already been demonstrated.[25] In the view of these judges *Gott* v. *Nairne*,[26] which was not referred to in *Re Wood*[27] or in the *Astor Trust*,[28] must be wrongly decided. Both Gray[29] and Egglestone[30] support this. They consider that the references to 'uncertainty' in *Morice* v. *Bishop of Durham*[31] were intended to express the invalidity of trusts which are not in favour of a definite *cestui que* trust and not to limit the principle so as to invalidate only trusts of which the purpose is indefinite.

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[18] *Ibid.*, at p. 1074.
[19] [1934] Ch. 342.
[20] (1876) 3 Ch.D. 278.
[21] [1949] 1 All E.R. 1100.
[22] [1952] 1 All E.R. 1067.
[23] [1949] 1 All E.R. 1100, at p. 1101.
[24] [1934] Ch. 342.

On the other hand other writers[32] express the view that lack of beneficiary is not always fatal and that it can be cured by certainty of purpose. Megarry[33] criticised the decision of Harman, J., in *Re Wood*[34] because he failed to advert to this point. Nathan supports this in his *Equity Through the Cases*.[35] Clauson, J., said in *Re Thompson*,[36] '. . . the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given'. This is supported by *Re Douglas*,[37] in which a gift of residue to be distributed among indefinite charitable objects and definite non-charitable objects within the discretion of the trustees was held to be good. Per Cotton, L.J.,[38] 'In my opinion the mere fact that there is in addition to those named and definite objects, a general indefinite object which is charity, will not make the gift bad. It would be good if it was limited to a charitable gift, although for purposes utterly indefinite; and the addition to that of *definite* purposes though they are not all charities will not, in my opinion, make the ultimate gift bad. So too Lindley, L.J., said,[39] 'The mere addition of one or two institutions which are *named* which may not be charitable does not introduce such an element of uncertainty as to make that part of her will void'. The difficulty about enforceability can be overcome in these cases as it is in the tomb and animal cases by giving to those who would be entitled to the fund but for the trust for its application the right to apply to the Court in case of misapplication. In my opinion, if the cases are to be regarded as founded on the basis of trusts, this interpretation is the correct one, and it is possible to create a non-charitable trust for a definite purpose. If they are regarded as founded on the basis of powers, the requirement of certainty is equally compelling since the analogy is to the special rather than to the general power of appointment.[40] It must be confessed, however, that the distinction between what is definite and what is indefinite might give rise to decisions no more justifiable than those in the 'charitable or benevolent' cases. Of this type of case Goddard, L.J., said in *Re Diplock*,[41] 'Indeed when I find a rule which says that if property is left to trustees to give to charitable *and* benevolent purposes, that is good, but if it is for charitable *or* benevolent purposes, it is not, I regard it with some distaste'. If distinctions of this sort are to be avoided the judiciary must revive the spirit of Jessel, M.R., who said in *Re Roberts*,[42] 'The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty'.[43]

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[25] *Supra*, pp. 155–156.
[26] (1876) 3 Ch.D. 278.
[27] [1949] 1 All E.R. 1100.
[28] [1952] 1 All E.R. 1067.
[29] See note 17, *supra*.
[30] *Purpose Trusts. Res Judicatae* 2: 118–124.
[31] (1804) 9 Ves. 399.
[32] See for example D. C. Potter, *Trusts for non-charitable purposes* (1949), 13 *The Conveyancer*, p. 418.
[33] (1949), 65 *Law Quarterly Review*, p. 304.
[34] [1949] 1 All E.R. 1100.
[35] (2nd ed.), p. 220.
[36] [1934] Ch. 342, at p. 344.
[37] (1887) 35 Ch.D. 472.
[38] *Ibid.*, at p. 486.

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[39] *Ibid.*, at p. 487.

[40] This is because the essence of a general power of appointment is that the donee should be able to appoint to himself, a result which a trustee is debarred by his office from achieving. The question whether purpose trusts can be equated to powers which are neither general nor special but none the less valid is considered in the next section.

[41] [1941] Ch. 253, at p. 266; see Scott, *Trusts for Charitable and Benevolent Purposes* (1945), 58 *Harvard Law Review*, p. 548. Cf. the American case of *Goodale* v. *Mooney*, 60 N.H. 528 where the Court held a trust for benevolent purposes to be a valid charitable trust on the ground that the testator probably did not know that there was any difference between the words 'charitable' and 'benevolent' and that most persons probably use the words indifferently and as meaning the same thing. Mr. Justice Vaisey in his evidence before the Charitable Trusts Committee pointed out that the word 'benevolent' etymologically and actually meant well-wishing in contradistinction to the word 'beneficent' which meant well-doing. 'From the mere fact that a man has what he conceives to be a good wish it does not at all follow that to carry that wish into effect would be beneficent'. See *Report of Charitable Trusts Committee* (1952), Cmd. 8710, para. 521. It is of course important that lawyers should pay proper regard to the use of language, but it is questionable whether the word benevolent is now used in its strict etymological sense. Nevertheless the Charitable Trusts Committee, though not unanimous on the issue, do not recommend any alteration in the law on this point: *op. cit.*, para. 534. In so doing they reject the experience of Australian and New Zealand statutes which preserve for charity trusts which have mixed objects and which would otherwise fail. See (Victoria) Property Law Act, 1928 (s. 131); (New South Wales) Conveyancing Act, 1938 (s. 37D); (New Zealand) Trustee Amendment Act, 1935 (s. 2) and notes in (1946), 62 *Law Quarterly Review*, at pp. 23 and 339.

3. A TRUST FAILS IF THE SETTLOR DELEGATES TO THE TRUSTEE THE POWER TO CHOOSE THE BENEFICIARIES OR OBJECTS OF THE TRUST

'The general law on the subject is well settled and is that the power of testamentary disposition is essentially a personal one and cannot be exercised by a will merely purporting to delegate to another the distribution of the testator's estate and the ascertainment of the objects of his bounty. But there are some real or apparent exceptions to or qualifications of this general rule. One is that of the creation of a general power which the donee may exercise for his own benefit, for such a power is equivalent to property. Another is that of the creation of a power of distribution amongst charities. A third is that of the creation of a power of selection amongst individuals or a class of individuals who are pointed out as the beneficiaries'.[44] The justification of the exception in favour of charity stems from the period when every testator was minded to devote part of his estate to charitable purposes. The apparent simplicity of the exception is, however, a snare for the unwary. For the exception to apply it must be certain that the trust fund will be devoted exclusively to purposes which are charitable. Hence a trust for charity is good because particularity can be given to the testator's general intention by settling a scheme. On the other hand, a gift for charitable or benevolent purposes is bad, since charity is not synonymous with benevolence and some hypothetical part of the trust fund may be applied to some hypothetical non-charitable benevolent purpose. The justification in favour of general powers of appointment is the fact that the donee of the power can appoint to himself and accordingly the creation of such a power is in some measure equivalent to a grant of property. The justification in favour of special powers of appointment lies in the fact that the testator has himself selected the class of persons or objects which is to benefit, and has merely left to the donee of the power the preferment either wholly or partially of one member of the class to another. It follows from this that if X gives Y power to appoint his property in whatever way he pleases the power is good since Y can appoint the property to himself and is thus virtually the owner of it. So, too, if X gives Y power to appoint his property among his nieces and nephews this is also good. It is true that Y cannot appoint to himself and that it cannot be regarded as a gift of the property to him, but this is not fatal since the nieces and nephews constitute a class of beneficiaries which is defined with sufficient precision. It would follow from this that a trust for uncertain objects would fail, and that any attempt to construe it as a power would be unsuccessful. The reason is that a trustee can never benefit from his trust, and so he would not be permitted to appoint to himself. Hence the analogy to a general power of appointment breaks down. So too does the analogy to special powers of appointment since in those cases the donee is debarred from appointing to himself but the objects of the power are defined with precision. The law is unfortunately not as simple as this, for there has come into being a type of power of appointment which is neither special nor general but which is none the less valid. Thus in *Re Park*,[45] a testator gave his residuary estate to his trustee in trust to pay the income thereof to any person or persons 'other than herself' or charitable institution or institutions and in such shares and proportions as his sister, J.A., should from time to time during her lifetime direct in writing, and from and after her decease in trust for charity. It was held by Clauson, J., that the trust was a valid and effectual trust and the power conferred on J.A. was a valid power. It was not invalid as an attempt *pro tanto* to leave it to J.A. to make a will for the testator which, in the language used by Lord Haldane in *Att.-Gen.* v. *National Provincial Bank,*[46] could not be done. Lord Haldane did not intend to question the principle that a person may by will confer on any person a power of appointment. A power to appoint to any one except X is good,[47] and it makes no difference that X is himself the donee of the power of appointment. This was followed by Vaisey, J., in *Re Jones*.[48] In that case T gave a protected life interest in a fund to her son and directed that after his death the fund should be held in trust 'for such person or persons living at the death of my said son as he shall by will or codicil appoint'. It was held that the power was a valid power exercisable by the son of the testatrix. Vaisey, J., said,[49] 'In each of the cases cited [50] it will be observed that the generality of the objects was limited by an exclusion. In other words from the totality of all possible objects certain specified objects were taken out. In the present case to which I understand there is nothing similar in the reports the class is defined affirmatively as consisting of all individuals living at the death of the appointer: I construe the words as equivalent to a subtraction from the generality of objects (1) of all corporate bodies, charities and the like and (2) of all individuals not actually in existence at the moment of the death of the appointer. Accordingly, although it is neither a general power nor a special power, I think that . . . it is a power permissible to be created and . . . that there is here a valid power of appointment'. On the basis of these decisions it might be argued that it is possible to create a trust for such charitable or benevolent purposes as A shall in his discretion select. It would, to adopt the words of Vaisey, J., be equivalent to a subtraction from the generality of objects: (1) of all objects which were not charitable, (2) of all objects which were not benevolent, (3) of all individuals. Accordingly although it would neither be a general nor a special power it would be a power permissible to be created and valid. It would be an easy step from this to say that if a trust for such charitable or benevolent objects as A shall select is valid, a trust for such charitable or benevolent objects as the trustees shall select ought also to be valid in the sense that the trustees though not compellable would none-the-less be permitted to make the selection. Hanbury[51] suggests that *Morice* v. *Bishop of Durham*[52] might have been decided in this way had the case been argued on these lines. It is submitted, however, that this suggestion is ill-founded and that *Morice* v. *Bishop of Durham* can be distinguished from *Re Park*.[53] The distinction is that there is a legal uncertainty in the use of the word 'benevolent'[54] which is not so in the use of the word 'persons'. The totality of persons living at any given time is uncertain but the uncertainty can be removed by selecting an individual—*id certum est quod reddi certum potest*. On the other hand the totality of benevolent objects at any given time is uncertain and the uncertainty can never be cured since one benevolent object is just as uncertain as any number of them—*id incertum est quod reddi certum non potest*. There is authority for this in *Att.-Gen. for New Zealand* v. *New Zealand Insurance Co. Ltd.*,[55] where it was held by the Privy Council that the want of precision was inherent in the word 'benevolent' itself. Consequently, however circumscribed the local area for the operation of the trust, it still remained that to predicate of an institution, society or object that it must be benevolent was not to identify it with the requisite precision. Although there is substance in this distinction I respectfully suggest that the decisions in *Re Park*[56] and *Re Jones*[57] have made such serious inroads into the rule against delegation of testamentary power that it is questionable whether the rule itself ought to be retained.[58]

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[42] (1882) 19 Ch.D. 520, at p. 529.

[43] Sometimes the difficulty is overcome by regarding the gift as a beneficial gift to the trustees. See *Robinson* v. *Dusgate* (1690) 2 Vern. 181; *Price* v. *Canterbury* (1807) 14 Ves. 364; *Gibbs* v. *Rumsey* (1813) 2 V. & B. 294; *Re Howell* [1915] 1 Ch. 241.

[44] *Re Hughes* [1921] 2 Ch. 208, at p. 212, *per* Sargant, J.

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[45] [1932] 1 Ch. 580, doubted in the Australian case of *Tatham* v. *Huxtable* (1950) 81 C.L.R. 639.

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[46] [1924] A.C. 262, at p. 268.

[47] See *Drake* v. *Att.-Gen.* (1843) 10 Cl. & F. 257 and *Re Byron's Settlement* [1891] 3 Ch. 474.

[48] [1945] 1 Ch. 105; cf. *Re Harvey* [1950] 1 All E.R. 491.

[49] *Ibid.*, at p. 107.

[50] *Re Byron's Settlement* [1891] 3 Ch. 474 and *Re Park* [1932] 1 Ch. 580.

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[51] *Modern Equity* (5th ed., 1949), pp. 217–218.

[52] (1804) 9 Ves. 399.

[53] [1932] 1 Ch. 580. Clauson, J., hinted, at p. 582, that if the power of selection had been given to the trustees instead of to a third party it would have been void. It is submitted that it offends all reason to make the validity of the trust depend upon this fine distinction, since neither the trustee nor the third party can benefit from the appointment.

[54] Cf. the evidence of Mr. Justice Vaisey before the Charitable Trusts Committee, note 41, *supra*.

[55] (1936) 53 T.L.R. 37.

[56] [1932] 1 Ch. 580.

[57] [1945] 1 Ch. 105.

[58] On the whole question of hybrid powers, see J. G. Fleming, *Hybrid Powers* (1948), 13 *The Conveyancer*, p. 20.

4. A TRUST FAILS IF IT IS ONE THE ADMINISTRATION OF WHICH THE COURT ITSELF COULD NOT IF NECESSARY UNDERTAKE AND CONTROL

This is the single principle out of which the first two of the preceding objections have arisen.[59] It is supported by judicial and academic authority. Thus one of the reasons given for holding void a bequest for the purpose of establishing a college for the training of suitable persons as mediums was the inability of the Court to supervise and control the administration of the trust.[60] Egglestone makes the point clearly[61]: 'The rule is not that the trust is valid if the Court can see *ex post facto* whether or not it has been performed, but that the trust must be of such a nature that the Court itself can direct the execution in cases where the trustee refuses to act, or in cases where there is no trustee for the time being'. These objections disappear, however, if one refuses to be misled by the magic of nomenclature. It is true that a trust is in general subject to supervision and control by the Court, but the Court itself recognises the validity of unenforceable discretions conferred on trustees.[62] Thus the Court will not help a beneficiary under a discretionary trust if the trustees have in the proper exercise of their discretion refused to give him anything at all. No interest is vested in the beneficiary until the discretion is each time exercised, though if the class of beneficiaries is entitled to the fund, and each member of it is *sui juris* the class as a whole can terminate the trust. Where, however, any member is under a disability the only remedy lies in the ability of the Court to insist on a bona fide execution of the discretion. The same is true of 'maintenance and advancement clauses' in trusts for infant beneficiaries, for in these cases the infant is not entitled to demand payment for maintenance but must rely on the bona fide exercise by the trustees of the discretion vested in them. Egglestone regards the analogy to a power as misleading.[63] He considers that the exercise of the power must be regarded as if it were contained in and exercised by the original settlement. If so we have a trust for a purpose and we are back where we started—there is no one to enforce it. This vicious circle is, however, more apparent than real. The interests of those entitled in default of the exercise of the power are vested; the effectual exercise of the power divests such interests; but if the power is itself invalid, or its exercise ineffectual the interests of those entitled in default stand as if the power had been omitted from the settlement. In truth if purpose trusts are like discretionary trusts equated to special powers of appointment this objection falls to the ground.[64]

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[59] The third objection is based on a supposed rule of public policy.

[60] *Re Hummeltenberg* [1923] 1 Ch. 237.

[61] *Loc. cit.,* at p. 121.

[62] D. C. Potter, *loc. cit.,* at pp. 423–424; A. K. R. Kiralfy, *Purpose Trusts, Powers and Conditions* (1950), 14 *The Conveyancer,* p. 374, at p. 375.

[63] *Loc. cit.,* at p. 123.

5. A TRUST FAILS IF THE EQUITABLE INTERESTS CREATED THEREUNDER MAY VEST OUTSIDE THE PERPETUITY PERIOD

It is well settled law that future equitable interests can be validly created if and only if they are limited to vest within a maximum period of a life or lives in being plus twenty-one years. This is the rule against remoteness of vesting. It applies to all future contingent equitable interests, *i.e.*, both to primary gifts and to gifts over following upon the determination of primary gifts. There is an exception to the rule in that a gift over from one charity to another may take effect at any future time, however remote.[65] For the exception to apply, however, it is necessary that both the primary gift and the gift over should be for charitable purposes. If this is so it is permissible to attach a lawful condition to the primary gift the occurrence of which will cause the primary gift to determine and the gift over to take effect. It is not permissible to attach an illegal condition to the gift to charity with a gift over to another charity on the occurrence of the condition. Thus in *Re Dalziel*[66] there was a gift to a hospital subject to a trust for the upkeep and repair of a tomb for an indefinite period with a gift over in default to another hospital. It was held that the primary gift was not to the hospital for the charitable purposes of the hospital but to the hospital for the non-charitable purpose of maintaining the tomb. Hence there was a gift from a non-charitable to a charitable purpose and since this was not limited to take effect within the perpetuity period it was void. The primary gift was also void since it created a non-charitable purpose trust tending to a perpetuity.[66a] There is a further exception or quasi-exception in favour of gifts over following upon determinable limitations in favour of charity and taking effect in favour of residuary legatees. This is based on the premise that just as a settlor may make a gift for charitable purposes in perpetuity so he may make it for some shorter period. If, therefore, the interest in favour of charity is a determinable one then whenever the determining event occurs the interest comes to an end for it has reached the boundary marked out by the instrument of its creation and it cannot overstep it. Suppose then that there is an express gift over in favour of a named person who by a later clause in the will is made residuary legatee. This gift over, being from a charity to a non-charity must necessarily fail unless it is limited to take effect within the perpetuity period. Nevertheless cases like *Re Randell*[67] decide that the gift over is good since the testator is merely indicating by express words the result which would be achieved by operation of law independently of his express words. In the circumstances we are forced to the conclusion that an expressed intention to give the property to the residuary legatee is not operative because it offends one rule of law, that is the rule against perpetuities but that an implied intention to the same end is effective because it is permitted by another rule of law, that is the rule that undisposed of interests fall into the estate and pass to the residuary legatee. The logic of this is questionable, for as Mr. Albery points out,[68] 'If it be right that after a determinable gift to a charity a testator cannot limit a further interest, but that he retains a mere possibility of reverter by way of resulting trust which is not alienable but must devolve according to law, then surely devolution according to law is devolution as on intestacy not devolution according to the wishes which the testator expresses in a later clause in his will to which the wonder-working label "residuary" is attached'. Logic stands defeated, however, for even before the Wills Act, 1837, it was decided that possibilities of reverter following upon determinable interests in personalty were bequeathable.[69] The quasi-exception has in fact been extended to cases in which the primary gift was not in favour of charity at all, but in favour of a cemetery company, and it was nevertheless held that the possibility of reverter following upon the determination of the primary gift devolved on the residuary legatee.[70] The exception must be regarded as questionable, however, since it is well settled that the rule against perpetuities applies (with one exception) to rights of re-entry exercisable in respect of freeholds for conditions broken,[71] and it is difficult to see why it should not equally apply to possibilities of reverter following upon determinable interests. As Sir John Bennett, Vice-Chancellor of the Lancaster Palatine Court of Chancery, said in *Hopper* v. *Liverpool Corporation*[72]: 'I cannot but think that if the rule against perpetuities applies to the possibility of reverter [*sic* right of re-entry] on a fee subject to a condition which may or may not happen, it must equally apply to a possibility of reverter on a fee limited to determine on an event which may or may not happen'. It is submitted that this view deserves to prevail, and that the incidents of fees upon condition and fees limited to determine ought to be equated as far as possible. The distinction between the two types of fees is difficult even for the lawyer to grasp and when grasped, if at all, it reveals a distinction of consequences flowing not from a distinction of substance but from a quibble of words.

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[64] D. C. Potter, *loc. cit.*, equates them to general powers of appointment. At most, however, they can be equated to the *Re Park* type of power.

[65] *Re Tyler* [1891] 3 Ch. 252.

[66] [1943] Ch. 277.

[66a] See section 6, *infra.*

[67] (1888) 38 Ch.D. 213.

[68] *Some further Reflections on Re Chardon* (1938), 54 *Law Quarterly Review,* p. 258, at p. 260.

[69] See Fearne on *Contingent Remainders* (10th ed.), Vol. 1, p. 548.

6. A TRUST FAILS IF THE CORPUS OF THE TRUST FUND MUST BE RETAINED BY THE TRUSTEES AND THE INCOME ONLY BE APPLIED FOR THE SPECIFIED NON-CHARITABLE PURPOSES FOR A PERIOD EXCEEDING THAT PERMITTED BY THE RULE AGAINST PERPETUITIES

The authorities deal mostly with gifts to unincorporated associations and gifts for the maintenance of tombs and animals. When applied to the former the rule is known as the rule against inalienability; when applied to the latter it is sometimes called the rule against perpetual duration[73]—a sort of equitable version of the Statute of Mortmain. The distinction of nomenclature is logically justifiable since unincorporated associations can through their committees of management alienate their property whereas tombs and animals cannot. Logically therefore if alienability were the test, trusts for unincorporated associations which did not prohibit alienation would be valid whereas trusts for tombs and animals would always be void since alienation of their beneficial interests would *ex hypothesi* be impossible.[73a] But this is not the law and both types of trust are valid provided certain requirements are complied with. Since, however, both the rule against inalienability and the rule against perpetual duration express the same root idea, it is unnecessary to be a purist and to quarrel over nomenclature. What then is this root idea? It is that dispositions of property cannot be made so as to tie up capital and render income only applicable for specified non-charitable purposes for too long a period. The meaning of this statement is only loosely conveyed by its description as the rule against inalienability. First, because there is never any inalienability of the *corpus* of the trust in any true sense, for the power to vary investments is always available to the trustees. And secondly the rule under consideration differs from the rule against remoteness of vesting (considered in the previous section) in this important respect. If there is any possibility that a future interest may vest at too remote a period, the interest fails, whereas in the case of unrestricted gifts to unincorporated associations if there is a possibility that the interest once vested may be applied beyond the perpetuity period it does not fail. In fact the probabilities are that the interest will be applied for the purposes of the association so long as the association itself lasts. Failure results not from the possibility of the permanence of the association, but from the attempt of the settlor to constitute a permanent fund. In my opinion the concept underlying the rule is best expressed not by the notion of inalienability but by that of mortmain. Equity does not permit a settlor to exercise a posthumous and indefinite control over funds which are given neither to persons nor to charities.

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[70] *Re Chardon* [1928] Ch. 464.

[71] *Re Hollis* [1899] 2 Ch. 540 (now L.P.A., 1925, s. 4 (3)).

[72] (1944) 88 S.J. 213.

[73] See Nathan, *Equity Through the Cases* (2nd ed.), pp. 216–223.

It is now necessary to consider in more detail gifts to unincorporated associations and gifts for the maintenance of tombs and animals. First with regard to unincorporated associations, it appears to be settled law that a gift to an unincorporated association beneficially is valid. Thus in *Re Smith*[74] a bequest in trust for the society or institution known as the Franciscan Friars of Clevedon in the County of Somerset absolutely was held to be good. Joyce, J., rejected the contention that a bequest not charitable to an unincorporated society or association was void because the legatee, not being a person in law, had no legal capacity and was incapable of taking property. He regarded decisions[75] in Ireland to that effect as having been overruled and continued[76]: 'No doubt, excluding cases of charitable bequests, a legatee must be either a natural person, or a corporation, but legacies to various unincorporated associations—for instance, a musical society: *Re Allsopp's Estate*[77]; the committee for the time being of the Corps of Commissionaires: *Re Clarke*,[78] and other instances have been given—were held to be perfectly good, because the courts consider the persons of whom the society or association is composed to be the legatees—the named society or association being in truth only a compendious or conventional designation for the aggregate of the members. . . . So in my opinion a bequest to any unincorporated society or association not charitable is good *because, and only because* it is treated as being and is a bequest to the several members of such society or association who can spend the money as they please. If there should be any understanding or even contract between these persons as to how the moneys so derived, that is from legacies, are to be expended, that is something with which in the absence of any express trust or direction in the will the executors who pay the legacy have nothing whatever to do'. It follows therefore that if the gift is construed to be for the society as such, it is good since it is regarded as a gift to the several members individually who constitute the society. The fact that the trust may continue for the benefit of future members is immaterial since the members who took in the first place have the entire equitable interest between them and can resettle the property so as to include others as and when they become members. The question arises, however, whether the equitable interest of each individual member is to be regarded as part of his own property liable for the payment of his debts like the rest of his property. Maitland[79] considered that practically it would not be, but it is difficult to avoid the conclusion that on principle it should be so liable. Restrictions on the availability of the property to satisfy the demands of the creditors of the individual members which are imposed by the rules of the association would be binding as between the members themselves but would not affect third parties such as creditors. Nor could the difficulty be avoided by the members making use of the device of the protective trust since it is clear that a person cannot settle his property upon himself until his bankruptcy so as to withdraw it from the reach of his creditors.[80] If therefore a gift to an unincorporated association is good because and only because it is a gift to the several members of the association, then each individual member's share must surely be subject to the normal incidents of property.

[73a] See, however, L. A. Sheridan, *Trusts for non-charitable purposes* (1953), 17 *The Conveyancer*, p. 46, at pp. 57–58. He argues that a tomb is not a beneficiary, but a part of the trust property. Hence the question of *its* ability to alienate is not material.

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[74] [1914] 1 Ch. 937.
[75] *Hogan* v. *Byrne*, 13 Ir.C.L.R. 166; *Morrow* v. *M'Conville*, 11 L.R.Ir. 236, at pp. 243, 246, 250.
[76] [1914] 1 Ch. 937, at pp. 947–948.
[77] (1884) 1 T.L.R. 4.
[78] [1901] 2 Ch. 110.

There are also decisions which clearly show that a gift to an association to be applied for the purposes of the association is valid. Thus in *Re Drummond*[81] there was a bequest of residue upon trust for the Old Bradfordians' Club, London (being a club for old boys of the Bradford Grammar School) to be utilised as the committee of the club should think fit in the interests of the club or school, and Eve, J., held that this was a valid trust. He said that he could not hold that there was a gift to the members individually. There was a trust but there was authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity: *Re Clarke*.[82] The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. The question must be asked 'If the equitable interest was not in the members individually, in whom was it vested?' Not in the Committee of Management, since it was not a gift to them beneficially, but upon trust. A possibility is that it is vested in the club itself which is given a sort of equitable corporate existence for this purpose, and any member of which can take proceedings for the enforcement of the trust. If this is so the wheel has turned full circle. Early Irish decisions held such trusts void for lack of corporate existence on the part of the beneficiary.[83] Do the English decisions now incorporate the beneficiaries to validate the trust? A way out of the difficulty of equitable incorporation might be to regard the decisions as examples of powers rather than of trusts. In this case the beneficial interest will remain in the settlor but will be liable to be divested by each separate payment or application, made by the committee of management. But if the analogy to a power is pressed any application made by the committee of management outside the perpetuity period would be void, which is not the law.[84] When the ability of members to divide the fund among themselves was regarded as the criterion of validity of these trusts, the equitable ownership could properly be said to be vested in them. But now that the ability of the committee of management to dispose of the funds is an alternative test of validity the question of equitable ownership is much more difficult to localise.

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[79] *Trust and Corporation, Selected Essays*, p. 196.

[80] *Re Burrough-Fowler* [1916] 2 Ch. 251.

[81] [1914] 2 Ch. 90, at p. 97.

[82] [1901] 2 Ch. 110.

If the gift is construed to be such that the trustees are bound to retain the *corpus* of the trust fund and apply the income only for the purpose specified for a period exceeding the perpetuity period, the gift is void. Thus in *Thomson* v. *Shakespear*[85] a trust for the formation and the care of a museum in Shakespeare's house was held void. So too *Re Clark's Trust,*[86] a bequest to the trustees for the time being of a friendly society to apply the income in aid of the funds of the society. *Re Swain*[87] a gift of income to a chess club and library. *Re Clifford*[88] a bequest of income to an angling society and *Re Patten*[89] legacies on trust to pay the income to various clubs. In *Carne* v. *Long*[90] there was a devise of land to a voluntary association, a club library in Penzance. There was nothing in the gift to prevent the trustees disposing of the land or spending the proceeds whenever they thought fit. But one of the rules of the library did in fact prevent this. It was accordingly held void as tending to a perpetuity. It was apparently overlooked that members had power to alter the rules at their annual meeting and they could have altered the rule which forbade them to dispose of capital. It may well be that the law was incorrectly applied to the facts of this case. Support for this is provided by *Re Taylor*[91] in which it was pointed out by Farwell, J., that the fact that there may be some difficulty in construing the rules or the constitution of an unincorporated association is not a matter which can affect the validity of the gift itself, provided that the rules when properly construed permit members to use the fund in any way they please either by applying the capital or the income to any of the designated purposes or by putting an end to the fund altogether and distributing it among themselves.

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[83] See note 75, *supra.*

[84] See W. O. Hart, *Some Reflections on Re Chardon* (1937), 53 *Law Quarterly Review,* p. 24, at pp. 41–48.

[85] (1860) 1 De G.F. & J. 399.

[86] (1875) 1 Ch.D. 497.

[87] (1908) 99 L.T. 604.

[88] (1911) 106 L.T. 14.

[89] [1929] 2 Ch. 276.

[90] (1860) 2 De G.F. & J. 75.

Next, with regard to trusts for the maintenance of tombs and animals. There is abundant authority[92] for the rule that such trusts are valid provided that the application of the income for the designated purpose is limited to a period not exceeding the perpetuity period. It will accordingly be sufficient to consider only those special aspects of the rule which cause difficulty. First is the question whether an animal can be chosen as the life in being for the purpose of the perpetuity period. In *Re Dean*[93] a trust for the maintenance of horses and hounds for a period of *fifty* years, if any of the horses and hounds should so long live, was upheld. This supports the view that the life in being might be that of an animal, at any rate when the life of the animal beneficiary was chosen, but since the point passed *sub silentio* in *Re Dean* and the perpetuity rule has been applied to this type of case by analogy, it is probable that the lives in being must always be human. This is supported by the decision in *Re Haines*,[94] in which Danckwerts, J., took judicial notice of the fact that a cat does not live longer than twenty-one years and upheld a trust for its maintenance. If the animal belongs to a species which normally lives longer than twenty-one years it is still not clear whether the trust will fail altogether or be valid for a period of twenty-one years only.

Second is the question of the creation of trusts for the maintenance of tombs or animals 'so far as the trustees can legally do so' or 'so long as the law permits'. In *Pirbright* v. *Salwey*[95] and *Re Hooper*[96] it was held that the income could be applied for a period of twenty-one years only. It is conceived that this is the maximum period of validity in such cases and that the trustees would not be permitted to extend the period of validity by selecting lives in being and incorporating them into the instrument of trust.[97]

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[91] [1940] Ch. 481.

[92] See the authorities cited in Nathan, *op. cit.*, pp. 216–217.

[93] (1889) 41 Ch.D. 552.

[94] (1952) *The Times* newspaper, November 7, 1952.

Third is the question of *Re Chardon*.[98] In that case there was a bequest upon trust to pay the income to a cemetery company so long as it should continue to maintain certain graves with a gift over to the residuary legatee in case the cemetery company failed to maintain the graves. The validity of the gift over has already been dealt with,[99] but Romer, J., held the primary gift valid, first, because there was nothing in the terms of the gift which would operate to fetter the right of the cemetery company to dispose of the income and, secondly, because those interested in residue, into which the legacy would fall on the determination of the interest of the cemetery company, could join with the cemetery company in disposing of the whole legacy. Nathan criticised this decision on the ground that it was a trust for the application of the income for the maintenance of graves for an indefinite period, and that it should accordingly have failed, and I adopted this view in the second edition of his book.[1] Gray,[2] however, has pointed out that 'in *Re Chardon* there was no trust for the maintenance of graves and no question of a mere power. The trustees held subject to a valid trust to pay to the cemetery company so long as the latter complied with the condition. The cemetery company took subject to the condition or special limitation but *not upon trust*. Wynn Parry, J., confirmed this in *Re Chambers*[3] in which he pointed out that the cemetery company was not required to use the income of the trust funds for the maintenance of the graves but could use other funds of their own, and he held a trust identical with that in *Re Chardon* to be valid. It is also clear from his judgment in *Re Wightwick*[4] that if the cemetery company had been required to use the trust income for the maintenance of the grave the trust would have failed. In that case he held a bequest of income to an Anti-Vivisection Society for the purposes of the society for an indefinite period void for perpetuity, since the society was required by the terms of the gift to apply that very income for the purpose specified. I am now of the opinion that, as the law stands at present, this interpretation of *Re Chardon* is correct and that the case does not violate the principles already enunciated. If, however, the view put forward earlier in this paper[5] concerning the desirability of assimilating determinable interests and interests upon condition is adopted, the trust created by *Re Chardon* should on the construction preferred by the Court have been absolute.

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[95] [1896] W.N. 86.

[96] [1932] 1 Ch. 38.

[97] Cf. *Re Vaux* [1939] Ch. 465 where in the case of a true power of appointment, the instrument being executory, the donee of the power could incorporate lives in being at the creation of the power into the appointment.

[98] [1928] Ch. 464.

[99] *Supra*, pp. 166–167.

[1] *Op. cit.*, p. 222.

[2] *Rule against Perpetuities* (4th ed.), p. 79, note 9.

[3] (1950) 66 T.L.R. 595.

Finally, it should be noted that trusts for other definite non-charitable purposes stand or fall by the same test of validity. Thus in *Re Nottage*[6] a bequest to the trustees of the Yacht Racing Association to provide annually out of the income a cup for the most successful yacht of the season failed as tending to a perpetuity, and so did the bequest in *Re Compton*[7] where there was a trust of income for the education of the descendants of three named families in perpetuity.

It has been contended that there is no need for a special perpetuity rule to deal with cases of definite non-charitable purpose trusts.[8] The argument is that these are not cases of trusts, but cases of powers which if they create interests at all create them from time to time at the trustee's discretion. Until such interests are created the beneficial interest is vested in some other person subject to divesting. In the case of the trust for tombs, animals and other definite purposes, the beneficial interest is vested in the settlor himself, his residuary legatee or next-of-kin, as the case may be. In the case of trusts for unincorporated associations, in which the gift is held to be for the members individually, the beneficial interest is in them. In cases where the gift is on trust for the purposes of the association, the beneficial interest is in the settlor or his estate until divested by the committee of management of the association. If this is so, the ordinary 'perpetuity rule applies to the vesting of each separate payment or application, when the power is exercised, as in the case of a special power, and the anomaly of the Rule against Perpetuities affecting the duration of an interest is eliminated'.[8] The difficulty, however, is that if this rule is applied, an application made for the purposes of an association outside the perpetuity period would be void, which is not the case.[9] Hence there does appear to be need for a special rule.

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[4] (1950) 66 T.L.R. 592.
[5] *Supra*, p. 167.
[6] [1895] 2 Ch. 649.
[7] [1946] 1 All E.R. 117.
[8] See A. K. R. Kiralfy, *loc. cit.*, and the authorities there considered.

[9] See note 86, *supra.*

9

THE CREATION AND ADMINISTRATION OF A TRUST IN THE CONFLICT OF LAWS

Valentine Latham

If an Englishman wants to provide out of investments in the United States for his daughter who is married to a Frenchman and lives in France, he will probably want to create a trust for her benefit, and that of any future children. But with which system of law should his solicitor comply when drawing up the trust instrument?[1] And if this problem is overcome, and the trust has been validly created, do the English rules against accumulations apply to the funds in America?

It is surprising that there has been so little written on this subject, as one might expect the problem to be a fairly common one in practice. But although books on the Conflict of Laws devote a chapter to contract, and one to tort, I know of none with a systematic chapter on trusts. This may be excused as there is so little periodical literature on the subject, but that in itself seems strange.[1a] It may be that, in practice, trusts usually arise under marriage settlements and those are dealt with by Dicey,[1b] who gives many references to authorities, and shows that, at any rate as to general principles, the law is clear.

CREATION OF A TRUST

Marriage settlements are usually bilateral, and being based on the agreement of persons from the families of each spouse, it is not surprising that the analogy of mercantile contracts has been followed. It is clear that for most purposes, the proper law of the settlement—that with which it is most closely connected—governs the creation of a marriage settlement. Of course other laws are relevant for some purposes; for instance in *Guépratte* v. *Young*[2] it was held that such a settlement was formally valid if it complied with the requirements of the place where it was executed. In *Van Grutten* v. *Digby,*[3] however, it was held that it would also be valid if in the form required by the proper law.

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[1] He must, of course, comply with s. 29 of the Exchange Control Act, 1947, which requires the consent of the Treasury to a settlement *inter vivos* by a person resident in the United Kingdom of property for the benefit of a person resident outside the sterling area.

[1a] P. E. N. Croucher, *Trusts of Movables in Private International Law* (1941), 4 *Modern Law Review*, p. 111; L. G. Hoar, *Some Aspects of Trusts in the Conflict of Laws* (1948), 26 *Canadian Bar Review*, p. 1415; G. W. Keeton, *Trusts in the Conflict of Laws* (1951), 4 *Current Legal Problems*, p. 107.

[1b] *The Conflict of Laws* (6th ed.), p. 787 *et seq.*

I know of no case in which the parties have expressly chosen to govern their contract by a legal system, with which their settlement had little or no factual connection. But in cases where the parties have made no express choice of law, the Courts treat the question as one of construction, and attempt to find, from the surrounding circumstances, which system of law the parties must have contemplated as governing their settlement. I will quote from the judgment of Swinfen-Eady, J., in *Re Mackenzie*[4] to show the type of argument adopted by the Courts.

He says,[5] 'By what law are these settlements to be construed and governed? The husband's settlement in Scottish form must be governed by Scottish law. It is insisted, however, that the wife's settlement must be governed by English law, and not by the law of the matrimonial domicile which is Scottish. It is a question of the intention of the parties. As a general rule, the law of the matrimonial domicile is applicable to a contract in consideration of marriage, but this is not an absolute rule; it yields to the intention of the parties, either expressed, or to be gathered from all the circumstances of the case. In *Re Hernando,*[6] where a domiciled Englishwoman married a domiciled Spaniard, it was held that the settlement by the wife in English form took effect according to English law, but the settlement contained an express declaration that the deed should take effect and be construed according to the law of England. In *Re Mégret,*[7] where a domiciled Englishwoman married a domiciled Frenchman, and there was a settlement in English form of English personal property, it was held by Cozens-Hardy, J., that the settlement was governed by English law, and that all the settled property passed under the will of the wife, notwithstanding the limitations imposed by French law on testamentary disposition. Swinfen-Eady, J., proceeds to cite Cozens-Hardy, J.'s judgment to show that the two sides of the contract may be governed by different legal systems.[8] He then holds, in the case before him (*Re Mackenzie*) that, 'having regard to all the circumstances . . . to the contemporaneous settlements—that of the husband in Scottish form, with Scottish legal terms—that of the wife in English form, with English legal terms, imposing on the wife a restraint upon anticipation, a comparatively modern invention of English law, providing in certain events for the wife's property being distributed in accordance with the English Statute of Distributions, I am satisfied that all the parties to the English settlement intended that English law should govern and regulate it, and I so decide'.

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[2] (1851) 4 de G. & Sm. 217.
[3] (1862) 31 Beav. 561.
[4] [1911] 1 Ch. 578.
[5] *Ibid.*, at p. 596.
[6] (1884) 27 Ch.D. 284.
[7] [1901] 1 Ch. 547, at p. 549.

This type of judgment in a less abridged form is typical of the cases deciding the proper law of the marriage settlement. There is a presumption in favour of the matrimonial domicile, but it is easily displaced as to a settlement of the wife's funds should she be domiciled elsewhere. One could give a list of factors that have been held material by the Courts, but the number capable of consideration in subsequent cases is infinite. The choice of the proper law is a question of construction, although its operation may affect the validity of the contract.

The analogy of mercantile contracts, having been applied to bilateral marriage settlements, has been extended in Scotland to a unilateral marriage settlement. In *Stirling or Sawrey Cookson* v. *Warnock et al.*[9] the Court had to consider a unilateral trust deed executed by a Scottish lady before her marriage to an Englishman. The question to be decided was whether she could revoke the trust. The Lord President decided that as most factors relating to the trust were Scottish, the revocability of the deed should be governed by Scottish and not English law. In other words he used the same tests to determine the terms of a unilateral settlement as are used in relation to bilateral settlements.

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[8] *Chamberlain* v. *Napier* (1880) 15 Ch.D. 614, at p. 631; *Hamlyn and Co.* v. *Talisker Distillery* [1894] A.C. 202; *Re Fitzgerald* [1904] 1 Ch. 573, at p. 587; *British S. Africa Co.* v. *De Beers Consolidated Mines, Ltd.* [1910] 1 Ch. 354, at p. 383.

[9] (1905) 8 S.C. 157.

On these marriage settlements, doubts as to the state of the law are on comparatively minor matters. The law governing capacity to make a settlement may be uncertain [10]—the older view being that it was governed by the pre-nuptial domicile of the parties, and the more modern view being that the proper law should supply the test. But the proper law certainly determines most matters; for instance it governs construction.

In *Re Barnard* [11] an Englishman married a Scotswoman. By marriage articles in Scottish form he covenanted to pay her an annuity of £200 per annum should she survive him and also the sum of £3,000 to the children of the marriage after his death. She did survive him, but his estate was insufficient to meet both calls. If the settlement was to be construed by English law, the claims would rank equally and abate rateably, but by Scottish law the widow's claim would have priority. Kay, J., cited several cases to show that the parties must have intended Scottish law to govern the contract, although he does not actually mention the phrase 'proper law' and held that the widow had priority, as Scottish law governed the construction of the settlement. The proper law also governs essential validity, as will be seen when I mention *Re Fitzgerald* [12] later in a different connection.

That its rules are an alternative to those of the *lex loci actus* as regards form can be seen in *Van Grutten* v. *Digby*.[13] There H, who was domiciled in France, and W, who was domiciled in England, were married in France where they intended to remain. Before the marriage W's English property was settled by an English deed in English form executed in Paris, but void in France because not made before a *notaire*. H claimed the fund as being subject to French law, by which he had sole power of administration. During the negotiations for the settlement it had been agreed that the trustees should retain the capital in England. The Master of the Rolls, Sir John Romilly, said, 'I hold it to be the law of this country that if a foreigner and an Englishwoman make an express contract previous to marriage, and if on the faith of the contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then in that case the Court will administer the law on the subject as if the whole matter were to be regulated by English law'. The fact that the contract was not in the form of the *lex loci actus* was held irrelevant. The settlement itself and the circumstances show that it was intended that the property should not be subject to French law, and so H was not entitled to the capital of the fund from the English trustees.

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[10] Morris, 54 *Law Quarterly Review* (1938), pp. 78–86.
[11] *B.* v. *White* (1887) 56 L.T. (N.S.) 9.
[12] *Infra,* pp. 182–183.
[13] (1862) 31 Beav. 561.

Of course, should the proper law decide that a trust has been validly created, it may be necessary to transfer the trust funds to the trustee, in accordance with the law appropriate to the normal transfer of such property. Where, however, transfer is impossible by the law creating the interest in the property, then an English court will not compel it,[14] and in some cases the trust may fail for impossibility. But this does not detract from the sphere of the proper law, it merely shows how it operates. In *Re Pearse's Settlement*[15] a marriage settlement contained a covenant that all the wife's property (with certain exceptions not relevant to the case) should be assured and transferred to the trustees of the settlement on trust to sell and hold the proceeds on the trusts of the wife's fund. Some years later she became entitled to land in Jersey. By the law of that island such trusts were not recognised, and all transfers were required to be made for valuable pecuniary consideration, so that she could not transfer it gratuitously to the trustees. Eve, J., held that since a purported conveyance to the trustees would be void, it would be useless for the court to compel it. He then construed the covenant to see whether it required her to sell her interest to a third party for its full value, and then pay the proceeds to the trustees, but decided that it should not be so interpreted. He held, therefore, that the property was not caught by the covenant, which could not be construed either to require the realisation of the assets and payment to the trustees or the execution of a void conveyance to them.

As to the creation of testamentary trusts there is very little authority, but again the law seems clear. Dean Falconbridge, a distinguished Canadian authority on the Conflict of Laws, says in his *Essays*,[16] 'The question of the validity of a testamentary trust would appear to be indistinguishable from the question of the validity of will which creates the trust'. And as it governs all questions as to the construction of the will, it should presumably be used to construe any trust dispositions contained in it. In *Re Aganoor's Trusts*[17] the testatrix left English movables to G on condition that so much income as should be needed for his support should be paid during his minority, 'but he can never in any way dispose of the said capital' without certain consents, and if he should die without issue, the property should revert to the estate and go to C. There was some doubt as to whether the testatrix was domiciled in England or Italy at her death, but Romer, J., held that such a gift was not invalid by English law for repugnancy. He also decided that by the Austrian law in force at the time of her death the trust was valid, but by a retrospective alteration of the law subsequently made by the introduction of the Italian Civil Code, the substitutionary trust was void. He held, however, that the creation of a trust of movables was governed by the law of the deceased's domicile at death, and the subsequent retrospective change in the law was immaterial, despite the fact that the beneficiaries were Italian. Since, then, the gift was valid by either law at her death, it became unnecessary to decide her domicile. The will had already been admitted to probate, so the validity of the will as such had already been determined.

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[14] *Master* v. *De Croismar* (1848) 11 Beav. 184.

[15] *Pearse* v. *Pearse* [1909] 1 Ch. 305.

[16] At p. 560.

The only other relevant case of which I know is *Peillon* v. *Brooking*.[18] A testator, who died domiciled here, bequeathed movables to a married woman, domiciled in Sardinia, to her separate use without power of anticipation. The question to be decided was whether the restraint, unknown to Sardinian law, could be disregarded. But the Master of the Rolls, Sir John Romilly, held that the English law of the testator's domicile governed the construction and validity of the trusts, including the restraint, which could therefore not be disregarded, although he thought that a scheme anticipating the income would have been very beneficial.

Though there are only two cases on this branch of the law, what they decide appears so obviously correct, that it seems clear that the creation of a testamentary trust of movables is governed by the domicile of the deceased at the time of his death.

[17] (1895) 64 L.J. (N.S.) Ch. 521.

[18] (1858) 25 Beav. 218.

It is submitted (without authority) that secret trusts, since they operate *dehors* the will[19] are governed not by the law of the testator's domicile, but by the law with which the communication to the legatee or the person taking on intestacy and his acquiescence, have the most substantial connections, the proper law of the communication. Although the passing of the property to the trustees will depend on the law governing succession.

We come now to the more doubtful case of trusts created neither under a marriage settlement, nor by will. And here there is hardly any English authority, so I will consider some of the cases from Australia and Canada.

In *Twaddell* v. *New Oriental Bank Ltd.*[20] the Supreme Court of Victoria had to consider an insurance policy taken out in Scotland by H, who was domiciled in Australia, and expressed to be for the benefit of his wife and children. By the Victorian Married Women's Property Act, 1850 (no. 1116), s. 14, such a policy creates a trust in favour of the holder's family and the money payable thereunder ceases to be part of his estate or liable for his debts, the holder, or his personal representatives, being trustees. Nevertheless, H pledged the policy with a Victorian bank as security for an overdraft. One might have expected Hodges, J., to consider the scope of the statute—did it apply to policies made in favour of Victorian dependents, or did it apply to policies granted in Victoria, or under Victorian law?[21] It is therefore disappointing to find that he applied it merely because the contract of assignment was made in Victoria. It is submitted that Rule 132 in *Dicey* is preferable, for that states that the assignability of a *chose in action* is governed by the law creating the *chose*. This may be supported by the Court of Appeal case of *Re Fitzgerald*.[22] There, under a settlement, the proper law of which was held to be Scottish, an alimentary life interest was granted to the husband. By Scottish law such an interest is inalienable. He later executed a general assignment for the benefit of English creditors, and the Court held that the alienability was to be determined by Scottish law. (The alimentary interest was not contrary to English public policy, as similar results could have been obtained here by means of a protective trust.) If, then, the assignability is to be governed by the original contract one might have expected Scottish law to have been relevant in the *Twaddell Case*. But it is explicable on the grounds that the Victorian statute bound the Victorian judge, and if its purpose was to protect Victorian married women, then he had no option but to apply it. The case is disappointing from our point of view, as it was not necessary to decide what law governed the alienability of the policy. The Scottish firm would probably have granted a policy only under the law of that State, and how could a Victorian statute apply? Had the case come before the courts of a third State the question would have arisen.

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[19] *Re Young* [1950] 2 All E.R. 1245, at p. 1250, where Danckwerts, J., says, '. . . the whole theory of the formation of a secret trust is that the Wills Act, 1837, has nothing to do with the matter . . . the persons who take beneficially taking, not by virtue of the gift in the will, which is made to a trustee, but by virtue of the secret trusts which are imposed on the apparent beneficiary who does, in fact, take under the will'.

[20] (1895) 21 V.L.R. 171.

[21] See W. W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942), pp. 270–276.

[22] [1904] 1 Ch. 573; though it concerned a general not a particular assignment and so is not cited in *Dicey* in this connection.

Before discussing the next two cases I should mention the construction of section 2 (2) of the Succession Duty Act, 1853, which provided that duty was payable on a 'succession', and defined 'succession' by enacting that 'every disposition of property . . . by reason whereof any person . . . shall become beneficially entitled to any property or the income thereof on the death of any person . . . shall be deemed to . . . confer . . . a succession'. Under the Finance Act, 1949, succession duty has been abolished, but the cases decided on this provision remain of importance in the present discussion. The provision had to be construed restrictively as otherwise it would have imposed liability for succession duty on, *e.g.*, a French beneficiary under a French will. And in fact the courts did confine its application to cases where a person had become entitled under English law. In the case of marriage settlements, then, where the proper law of the settlement is English, the children would take by virtue of English law, and succession duty would formerly have been exigible (*Marlborough* (*Duke*) v. *Att.-Gen.*).[23] The cases decided on this provision, though not themselves concerned with the creation of a trust, did purport to find the law governing its creation, and so, in the absence of better authority, may be used for that purpose.

[23] [1945] 1 Ch. 78.

In *Att.-Gen.* v. *Jewish Colonisation Association,*[24] F, domiciled in Austria, by a deed in the English language and form, gave to an English Company which he had previously created, certain movables, on condition that they gave the income to him for life, and after his death applied the fund for the benefit of Russian Jews generally, and especially for their emigration from Europe. The Company's business was transacted by a council sitting in Paris, but its formal business and general meetings took place in London. F died domiciled in Austria, and it was held that succession duty was payable. F had deliberately created an English company which would be subject to the English courts.

Here we have the Court of Appeal applying to a trust made by unilateral deed, tests similar to those used in construing a marriage settlement, save, of course, that the presumption in favour of the intended matrimonial domicile cannot apply.

It is well known that under a protective trust, the trustees must pay the income of the fund to the principal beneficiary for life so long as nothing has occurred which would enable someone else to recover it from him. Should he purport to assign his interest, then they may pay any one or more of several beneficiaries at their discretion.

In *Re Pilkington's Will Trusts*[25] H, who was domiciled in England, was entitled to a protected life interest under an English trust. Then by a deed, the proper law of which was Scottish, he assigned all his property to trustees for the benefit of creditors. By English law this was void, because not registered under the Deeds of Arrangement Act, 1914, s. 2, but by Scottish law it was valid. The question to be decided was whether this caused a forfeiture of his interest and brought the discretionary trusts into operation. It was first held that on construing the deed, it did include this interest. Farwell, J., then decided that the proper law of the assignment was Scottish, and held it to be valid (though there would be nothing to transfer to the trustee, as it would give rise to a forfeiture of the interest). It may be argued that this was a case of a general assignment, and not of a particular transfer on trust, but Farwell, J., made no such distinction and I cannot see its validity.

There is, however, a recent Australian case which faces the problem squarely. In *Lindsay* v. *Miller*[26] a summons was taken out before the Supreme Court of Victoria to decide by which system of law the validity and construction of a trust deed should be determined. Lowe, J., remarked that there was much learning on the proper law of a contract, some on marriage settlements but less on that of other trust deeds. But he cited the case of *Re Pilkington's Will Trusts* which we have just discussed, to show that the proper law of a deed of arrangement, executed by an Englishman in Scotland, should be determined by the contractual tests and has the same function. He said that the proper law is primarily that intended by the parties; and if, as there, that is not expressed, it should be gathered from the subject matter of the transaction and any other circumstances. He then applied these tests to the settlement before him, and determined its validity by Victorian law, as the preponderance of significant elements was in that State.

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[24] [1901] 1 K.B. 123 (C.A.).

[25] [1937] 3 All E.R. 213.

It would seem then, that Mr. Croucher's caution[27] that the law as to marriage settlements might not apply to other trust deeds has, in the event, proved unfounded. It may be that Australian cases are rarely cited in English courts, but English ones are lacking and the Australian Court did consider such English authority as there was and purported to follow it.

ADMINISTRATION OF A TRUST

But, though the creation of a trust may be governed by the law with which it is most closely connected, it does not follow that its administration will be governed by the same law. Such matters as the range of investments permitted to a trustee, and the application of the rules restricting the holding of land in mortmain, may not be governed by the proper law. I should like first to submit that the law where the trust property may happen to be, the *lex situs,* is the law governing administration, and then to consider two possible tests for distinguishing matters relating to administration. English literature on these points is even more scanty than on the creation of a trust, but in Canada some work has been done. There is an excellent article by Mr. Hoar in 26 *Canadian Bar Review* at p. 1415 which deals with the distinction between creation and administration. And Dean Falconbridge has in his *Essays*[28] dealt with the law governing administration.

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[26] [1949] V.L.R. 13.

[27] 4 *Modern Law Review* 111, at p. 117 and that of *Mr. Hoar,* 26 *Canadian Bar Review* (1948) 1415, at p. 1420.

One of the earliest cases on administration of a trust was *Oliphant* v. *Hendrie.*[29] The Mortmain Acts prohibited devises of English land for any charitable use, and this had been held in *Curtis* v. *Hutton*[30] to apply to devises of English land for foreign charities. In *Oliphant* v. *Hendrie,* however, Lord Thurlow held that where English money was to be invested in Scottish land for Scottish charities, the Mortmain Acts, which did not apply to Scotland, did not invalidate the gift. But the very short report gives no reasons for the decision, nor does that of Lord Eldon's judgment in *Mackintosh* v. *Townsend,*[31] in which he followed it.

That these cases are to be explained on the ground that the Mortmain Acts relate to administration and so apply only to English land is shown by *Fordyce* v. *Bridges,*[32] which proves that the laws governing creation and validity do not necessarily coincide. English movables were left on a trust, created by English law, to be invested either in English land on certain valid trusts, or in Scottish land to be held in regular entail. Under this system the entail cannot be barred, and so, if English law applied, would be void for perpetuity. Lord Cottenham, L.C., considered the rule against perpetuities and said that it was not a part of Scottish law. He then used the mortmain cases to show that in matters of administration, it is the place where the funds happen to be that is relevant. And he proceeded to say that therefore the rule against perpetuities did not apply to the Scottish land, although held under an English trust.

In the Ontario case of *Parkhurst* v. *Roy*[33] a testator domiciled in Ontario bequeathed movables in the U.S.A. to the State of Vermont, with a non-imperative direction to accumulate until the fund had reached a certain amount, and then to apply it for certain charitable purposes. The will contemplated that the

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[28] At p. 560.

[29] (1784) 1 Bro.C.C. 571.

[30] (1808) 14 Ves. 538.

[31] (1809) 16 Ves. 330–337.

[32] (1848) 2 Ph. 497, followed in *Re Mitchener, decd.* (No. 2) [1922] Q.S.R. 252, at p. 268, by Shand, J., delivering the judgment of the Supreme Court of Queensland.

[33] (1880) 27 Gr. 361, affd. 7 O.A.R. 614.

Vermont legislature would appoint trustees to administer the fund subject to the jurisdiction of the Vermont courts. It was held that the trust was good, and that it was for the Vermont courts, as the forum of administration, to decide the question of accumulation.[34]

But in the cases as to the direction by the Court of a scheme for charitable trusts, whether *cy-près* or otherwise, the test is not the situation of the property but the residence of the trustees.[35] In *Re Colonial Bishoprics Fund (1841)*,[36] the original objects of the trust, which was for a South African charity, failed and a petition was presented to the English Court for the application of the funds *cy-près*. Luxmore, J., said that he had jurisdiction to grant the petition as the trustees were resident in England, and so he made the required order.

But where there are no trustees within the jurisdiction, the Court will not direct a scheme, for, as Sir John Romilly, M.R., said in *Att.-Gen.* v. *Sturge*,[37] 'Unless the [settlor] has so directed, the Court itself has not the means of administering the charity abroad'. If the funds are in England, they will be remitted to any foreign trustees who have been appointed, but there the responsibilities of the English Court cease.[38] But the practice of remitting funds to the foreign trustees dates back to the eighteenth century, before problems of the Conflicts of Laws had been fully considered.[39] And once the funds have been forwarded to the foreign trustees, the tests coincide. It is submitted that the residence test is not entirely satisfactory; what happens, for instance, if each trustee resides in a different State?

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[34] *Ibid.*, at p. 371 *et seq.*

[35] *Re Colonial Bishoprics Fund (1841)*, [1935] 1 Ch. 148; *Att.-Gen.* v. *Sturge* (1854) 19 Beav. 597.

[36] [1935] 1 Ch. 148.

[37] (1854) 18 Beav. 597.

[38] In *Re Vagliano, Vagliano* v. *Vagliano* [1905] W.N. 179 where some only of the trustees were in England and a scheme was directed.

[39] In *Provost of Edinburgh etc.* v. *Aubery* (1875) Ambler 236, Lord Hardwicke, L.C., was of the opinion that he could not direct a scheme, but the report gives no argument based either on principle or on authority. In *Att.-Gen.* v. *Lepine* (1818) 2 Swans. 181, no reasons were given for not directing a scheme, apart from Lord Hardwicke's judgment. The Court appeared to confine the rule to Scottish charities. The report of *Minet* v. *Vulliamy* (1819) 1 Russ. 113 (n.), merely states the facts and decision, but the rule was applied to a Swiss charity. In subsequent cases, there seems to have been no argument on the point other than the citation of these cases: *Emery* v. *Hill* (1826) 1 Russ. 112; *Society for the Propagation of the Gospel in Foreign Parts* v. *Att.-Gen.* (1826) 3 Russ. 142; *Collyer* v. *Burnett* (1829) Tamlyn 79; *Att.-Gen.* v. *Sturge* (1854) 19 Beav. 597; *Re Mitchener* [1922] Q.S.R. 252, at p. 265; *Re Robinson* [1931] 2 Ch. 122.

But the test of the residence of trustees is not consistent with *Fordyce* v. *Bridges*,[40] though *Parkhurst* v. *Roy*[41] could be explained on this basis. It is therefore submitted that this test should be confined to the direction of schemes for charitable trusts and not be extended to other questions of administration.

There are several cases on the law governing the permitted range of investments for trust funds. In *Re Tyndall*[42] the estate of the testator was being administered under grants of Probate in Ireland and Australia, and Murray, J., of South Australia held that the funds under each administration should be invested in securities permitted by that law.

In the recent case of *Re Oldfield (No. 2)*[43] the testator, domiciled in England, but temporarily resident in Manitoba, made a will of property in Manitoba, leaving certain sums of money to trustees for charitable purposes. Williams, C.J.K.B., said that the investments allowed by the testator might be or become impossible or bad, and so should be put into those allowed by the Manitoban law of the administration. For this proposition he cites *Re Nanton*,[44] *Freke* v. *Carbery*[45] and *Falconbridge*,[46] 'The valid creation of a testamentary trust being assumed, including the vesting of the title to or the control of assets in the trustee, a different question is what law governs the administration of the trust. It would seem that whatever be the nature of the trust *res* and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the *lex rei sitae*, including whatever effect that law gives to the expressed or implied intention of the testator. This law would also be the *lex fori* as regards the control which a court of the *situs* may exercise over the administration'.

In the Manitoban case of *Re Nanton*,[44] which concerned the powers of advancement and maintenance, Williams, C.J.K.B., adopted Dean Falconbridge's test as correct. There the testator left funds for two infants on condition they attained 21 years of age, and subject thereto to their father. There were no directions for accumulation. The testator died domiciled in Ontario, but the trustees were living in Manitoba where the trust was being administered. The testator's executors petitioned for an order that the trustee (one of the executors) be authorised to pay the income during the infants' minority to their father for their maintenance and advancement. Williams, C.J.K.B., held that Manitoban law applied, as both trustees and funds were within the jurisdiction. He adopts Dean Falconbridge's statement of the law[46] as correct. Williams, C.J.K.B., proceeded to apply Lord Cranworth's Act as being part of Manitoban law, and said that the trustees had a discretion to pay income to the infants' guardian for their maintenance and education, and should accumulate the rest. But there, as in *Parkhurst* v. *Roy*,[47] the *lex situs* and the residence of the trustees coincided.

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[40] (1848) 2 Ph. 497.
[41] (1880) 27 Gr. 361, affd. 7 O.A.R. 614.
[42] [1913] S.A.L.R. 39.
[43] [1949] 2 D.L.R. 175.
[44] [1948] 2 W.W.R. 113.
[45] (1873) L.R. 16 Eq. 461.
[46] *Op. cit.*, at p. 560.

But what if the *situs* of the funds changes? Is it the *situs* when the trust comes into operation, or when the rule in question does so? In investment cases it would seem to be the latter. In the Victorian case of *Re Kay*[47a] Mann, J., admits that the transfer of movables to New Zealand may alter the powers of investment. And earlier, in the *Will of Gibson deceased*,[47b] the same judge had, in authorising the transfer of movables to England, said that they should be invested in securities permitted by English law.

Fordyce v. *Bridges*[48] shows that this rule applies also to the rule against perpetuities. The settlor had given the trustees discretion to invest English property either in English land to be held under valid limitations, or in Scottish land on limitations valid by Scottish law, but contrary to our rule against perpetuities. Had the rule been that the *lex situs* of the funds when the trust arose governed administration, the rule would have applied to the Scottish land subsequently acquired, so Lord Cottenham, in holding that it did not, must be taken to have decided that the relevant date is that at which the rule begins to operate. The same principle is exemplified by *Parkhurst* v. Roy,[48a] as to the rule against accumulations.

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[47] *Supra*, note 33.
[47a] [1927] V.L.R. 66, at p. 69.
[47b] [1922] V.L.R. 715, at p. 719.
[48] *Supra*, note 32.

In *Canterbury* v. *Wyburn*,[49] a case before the Judicial Committee of the Privy Council on appeal from Victoria, a Victorian man had left movables to his executors, instructing them to remit them to the Corporation of Canterbury so that the Corporation might buy land on which to build a library. The question was as to the applicability of the Mortmain Acts which were in force in England, but not in Victoria. Lord Hobhouse cited A. Beckett, J.A., to the effect that the Acts do not absolutely prohibit the purchase of land, so the trust does not fail for impossibility.[50] He continued that he could hardly think the gift of foreign money for English charities to be an evil that two English Acts were attempting to prevent. He then considered at which point the Mortmain Acts come into operation; not between the testator and his executors, as that is a purely Victorian matter, nor in sending the money to the corporation as that does not infringe the Acts. 'The English law will operate whenever the purchase of land for the charitable uses is effected, but no earlier'.[51] This case is often cited as if it represented English as well as Victorian law, and it shows that in Mortmain cases it is the *lex situs* at the time the rule comes into operation that must be complied with.

This test, however, does seem to break down when the administrative question concerns the whole trust and not particular items of the fund. Under which legal system should new trustees be appointed, when the trustees or funds are scattered all over the world?

I know of no English case which adequately deals with the problem. *Re Kehr, Martin* v. *Foges*[51a] shows that where the English assets of a foreigner are held under letters of administration, trustees may be appointed under the Administration of Estates Act, 1925, s. 42, to administer the funds until the foreign beneficiary is of full age and that they will have all the powers

[48a] (1880) 27 Gr. 361, affd. 70 A.R. 614.

[49] [1895] A.C. 89.

[50] *Re Mitchener; Union Trustee of Australia Ltd.* v. *Att.-Gen. for the Commonwealth* (*No.* 2) [1922] Q.S.R. 252. The judgment of the Supreme Court of Queensland, delivered by Shand, J., at p. 265; also *Re Geck* (1894) 69 L.T. 819.

[51] *Ibid.*, at pp. 96–97.

[51a] [1952] 2 T.L.R. 788.

of English trustees, including those of maintenance and advancement and presumably of appointing new trustees. But Danckwerts, J., after considering *Re Wilks*[51b] held that the administration of the deceased's assets was complete only when the personal representative could get a valid discharge and until then English law applied on general principles. Our difficulty arises only when the administration is complete.[51c]

There is ample authority that foreign trustees may be appointed to an English trust,[51d] but it is assumed in the cases that an appointment under English law is sufficient. There is, however, an Australian case, *Wilmot* v. *Thorpe*,[51e] where, although it was not pleaded, Webb, J., adverted to the problem. Under an apparently English will, property in England and Victoria had been left to trustees, one resident in Victoria and two in England. One retirement and several appointments were made under the English Conveyancing Act of 1881 and the executors of the deceased Victorian trustee disputed the right of the new trustees to have the property vested in them: Webb, J., pointed out that if he held that the English statute did not apply to property outside England, he would destroy its effect to a large extent and he continued, 'Where there is a trust, some of the trustees being resident in England and some out and a vacancy in the trust occurs, the fact of there being property in England subject to the trust is enough to found the operation of the Act upon, to enable the appointment of a new trustee under it'.

It is submitted that he was right in ignoring the English character of the will creating the trust, as the learned judge was concerned with an administrative question. But what if inconsistent appointments are made in each country where there are assets? It is submitted, without authority, that the law of the place most closely connected with the main administration of the trust, the proper law of the administration, should govern.

Another interesting point arising from the case is that Webb, J., did not consider whether section 34 of the Conveyancing Act, 1881,[51f] which automatically vested the property

[51b] [1935] Ch. 645.

[51c] Falconbridge, *Essays*, Ch. 33.

[51d] *Meinerzhagen* v. *Davis* (1844) 1 Coll. 335.

[51e] [1895] V.L.R. 85.

[51f] Now replaced by the Trustee Act, 1925, s. 40.

in the new trustees, where the appointment was by deed, had been complied with. Yet he ordered the Victorian assets to be transferred to the new trustees. Presumably the funds must be assigned in accordance with the law governing the particular assignment of each item, not necessarily the law under which the new trustee is appointed.

From these Commonwealth cases, then, it appears that the law governing the administration of a trust of movables is the *lex situs* when the rule in question becomes operative. This certainly applies to powers of investment. But in English cases concerning the direction of a scheme for a charitable trust, it has been held that the residence of the trustees is the determining factor. This is also a possible explanation of *Parkhurst* v. *Roy* on the subject of accumulations, but *Re Nanton* on maintenance and advancement could hardly be explained on this basis, as Dean Falconbridge's test was expressly adopted. It may be that each question of administration should be considered separately,[52] or, on the other hand, it may be that Dean Falconbridge's test is the general rule, to which the direction of a scheme is an exception which grew up before the formulation of the rule.

As to the administration of trusts of land, Dean Falconbridge makes no distinction. But I am unable to reconcile *Parkhurst* v. *Roy* with the English case of *Freke* v. *Lord Carbery*,[53] where English property was devised to Irish trustees and it was held that not only the English leaseholds, but also the proceeds of their sale would be subject to the English rule against accumulations. Lord Selborne, L.C., did not discuss the point as to subjecting the proceeds of sale, possibly situate in Ireland, to the English rule, but held they would be so subject. There are three ways of explaining this inconsistency. The weakest is to say that English and Canadian law may differ on the point, for Canadian judges refer to English cases as often as to Canadian, and advert to no such distinction. The second is to distinguish the case of movables and immovables; but why? We have seen that the test applies to mortmain. Moreover, the judgment in *Freke* v. *Carbery* occupies only two pages in the report, and is mostly concerned with whether or not leaseholds are movable property. Lord Selborne probably did not advert to the point, and I submit that on this question the case is hardly an authority.

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[52] Hoar, 26 *Canadian Bar Review* (1948) 1415, at p. 1435.

[53] (1873) L.R. 16 Eq. 461.

Having now considered some of the matters that have been held to concern administration—the rule against perpetuities, the Mortmain Acts, investments and maintenance—we should be able to give the test which decides whether a rule relates to administration. But this is more easily said than done. Mr. Croucher[54] submits that 'there is this logical distinction between creation and administration—namely, that all questions as to the formal or essential validity of a trust including the validity of the beneficial interests intended to be created thereunder and the validity of the detailed provisions contained in the trust instrument are questions affecting the creation of the trust. Any other questions are administrative questions. If this is correct, then, for example, rules relating to perpetuities in the English sense are rules relating to the creation of trusts in that such rules determine the validity of beneficial interests'.

But we have seen that this conclusion does not represent English or Ontario law. Perhaps Mr. Croucher would dismiss *Fordyce* v. *Bridges* as an old case and wrongly decided. But I prefer the teleological approach of Mr. Hoar. Law is not a logical science in the sense that pure mathematics is; it is made to serve a purpose. True, if it rejects all logic it will become too uncertain and so cease to be a guide to conduct, its very function. But that is no reason for attempting to lay down wide generalisations covering large branches of law which serve many different purposes. Surely logic can be applied only between rules having the same function, for when two rules serve different purposes, the premises differ fundamentally. The rule against accumulations was enacted to prevent the tying up of English money indefinitely so that it could never be enjoyed by any one. It could have little to do with the rule allowing maintenance to infants under Lord Cranworth's Act or the Trustee Act. To employ one so-called 'logical' test to such diverse rules is surely pushing logic beyond its proper sphere. And it is interesting to notice that Professor W. W. Cook, whose earlier background was scientific and philosophical rather than legalistic,[55] is in constant rebellion against[56] such 'logic'. Yet science and philosophy are two of the subjects most dependent on true logic.

[54] 4 *Modern Law Review* (1941) 111, at p. 112.
[55] Lorenzen, 52 *Yale Law Journal* (1943) 680.
[56] *E.g., Logical and Legal Bases of the Conflict of Laws,* pp. 43–44.

It is submitted that Mr. Hoar's approach is far the healthier. It may involve slightly greater uncertainty[57] as it is not always easy to discover the purpose of a legal rule. The purposes may be complex, and even have changed with the times; and a practising solicitor has little leisure or perhaps inclination for social study. But a law that is not a formalistic fetter on the community must contain difficult points, merely because it must mould itself on to a changing society. Nor is this point likely to cause many practical headaches. Many rules have already been held to be administrative, and such *lacunae* as remain can always be filled by the process of precedent. It is submitted that this is a field in which a comparison of the decisions of other common law countries can be extremely helpful, as the rules are far from being fully worked out, and some relate to conditions of centuries ago.[58] The decisions in modern communities similar to our own might well be of greater assistance than early English cases.

CONCLUSION

It is clear that the law governing the creation of a marriage settlement trust is its proper law. But in cases where no system of law was expressly chosen by the parties, the courts said they were applying the law the parties must have intended. The position where they have chosen a system with which the settlement has little factual connection has not been considered by the courts. Is it the same as in mercantile contracts? And what indeed is that rule?[59]

It is also fairly clear that the law governing the validity of the will itself governs the validity of dispositions in it by way of trust. The courts do not seem to have made the distinction.

As for trusts *inter vivos,* authority in this country is most surprisingly thin, consisting only of one case of a general assignment on trust for creditors, but the Australian case of *Lindsay* v. *Miller*[60] equates such trusts with marriage settlements for this purpose.

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[57] But some measure of uncertainty is inevitable in Law. See Jerome Frank, *Law and the Modern Mind, passim.*

[58] *Campbell* v. *Radner,* on mortmain, was decided in 1783, and *Oliphant* v. *Hendrie* the following year.

[59] See Mann, 3 *International Law Quarterly* 60, and reply by Morris, 3 *International Law Quarterly* 197.

[60] [1949] V.L.R. 13.

The test for distinguishing the administration from the creation of a trust has never been considered by the courts when making this distinction. And I have considered the only two theories of which I know.

In most cases the law governing administrative matters would seem, from Canadian and Australian cases, to be the place where the funds are when the rule comes into operation. But the English cases on the direction of a charitable scheme, which clearly relates to administration, are inconsistent with this test and, it is submitted, form an exception to it. But your guess is as good as mine!

10

COPYRIGHT LAW REVISION

E. R. H. Ivamy

It is now over forty years since the law of copyright was overhauled. Since that time there have been spectacular developments in the technical field and some parts of the present law clearly need revision. Many different aspects of the matter could be considered but in this examination we may confine ourselves to some of those which most directly concern the public in the world of literary and artistic creation. Accordingly the pages that follow concern the following topics:—

1. performing rights in musical works;
2. gramophone companies and the public performance of their records;
3. copyright in the television of sporting spectacles;
4. the doctrine of moral right; and
5. international copyright protection.

PERFORMING RIGHTS IN MUSICAL WORKS

The Performing Right Society was formed in 1914 to protect the performing rights of composers, lyric writers and publishers, and to collect fees and royalties for the public performance of their works. This arrangement is clearly necessary or at least highly convenient to both authors and the public, but the monopolistic position of the Society has been the subject of criticism, and it was referred to as a 'super monopoly conferred upon composers by the Copyright Acts' in the Report of the Select Committee of the House of Commons on the Music and Copyright Bill in 1930. If this country adheres to the Berne Convention as amended at Rome in 1928, no action can be taken against any alleged monopolistic practices. But if the Brussels text of the Convention is ratified, the position is altered, because a declaration by the United Kingdom delegation was written into the Convention, whereby the Government was to remain free to enact such legislation as they might consider necessary in the public interest to prevent or deal with any abuse of the monopoly rights conferred upon owners of copyright by the law of the United Kingdom.

An individual copyright owner can naturally exact what fees he likes for the public performance of his work, and the question arises whether this should be the position if an association like the Performing Right Society becomes the assignee of the copyright of the works of a number of owners. At present a series of tariffs has been drawn up, covering public performances in cafés, restaurants, hotels, clubs, race tracks, dancing academies, theatres, cinemas, and all premises where public performances are likely to take place. The primary criticism seems to have been directed at the allegedly arbitrary way in which the tariff rates have been raised. These increases were alleged to be 'meteoric', and to spell insolvency for music users, and it was stated that it was wrong for any Society thus to be able to drive others out of business. It was true that the Performing Right Society had never refused to grant a licence, and had offered arbitration. But was that sufficient? The costs of arbitration were high, and in any case arbitration usually led to a compromise, and did not this tend to make the Performing Right Society pitch their claim twice as high as they really thought reasonable on the basis that it would be halved anyway?

It is a condition imposed by the Performing Right Society that every time a number is played it must be recorded on a form showing details of (1) title, (2) composer, (3) publisher and (4) remarks. When a dance hall open twice daily uses a hundred numbers per day, some idea of the great amount of clerical work thrown upon the management can be estimated. There is a ruling that all music must be recorded whether it be Performing Right Society copyright, free for public performance, or copyright expired. The Society levies 100 per cent fees, as though all music is controlled by them. They make no allowance for any proportion of the numbers which are not under their control. It was alleged that no one is likely to go to the trouble of completing the Performing Right Society form accurately. When it is found that there are long titles of songs like 'I am looking over a four-leafed clover', and short ones like 'Shine' or 'Boo-hoo', it is likely that a lot of performances of 'Shine' or 'Boo-hoo' are going to appear on the form, whether the works have actually been performed or not.

A further criticism is that the Performing Right Society does not make available lists of the works in which it owns the performing right. It has been submitted that it is unreasonable that a person should hold a licence to perform musical works, the names of which cannot be ascertained. It is perfectly true that the Performing Right Society do publish a list of publishers of whose works they control the performing right, but that does not go far enough. A complete index should be prepared, and a small inspection fee should be paid as at the Registry of Joint Stock Companies.

To these criticisms the Performing Right Society has made a spirited reply. It claims that the tariffs are negotiated whenever possible with the appropriate representative associations, that arbitration is consistently offered by the Society which is in accordance with the view expressed by the Select Committee of 1930, that copies of the tariffs are deposited voluntarily with the Board of Trade, and that no licensee is assessed at a rate in excess of the appropriate tariff. There is no evidence that tariffs have been irresponsibly doubled. Some of the early forms of tariff have been revised, because they were unsatisfactory in the matter of their incidence and factors of assessment, and by reason of their containing the element of reduction for quantity. When all licensees are charged at the same relative rates, the fees of the large consumers necessarily increase, those of the average consumers are affected but slightly, if at all, while the smallest consumers benefit by a decrease. Such increases as have occurred represent in the main some endeavour to keep pace with the Society's increasing repertoire, and the consequent enhanced value of its licences. There is no evidence that the Society would put in higher demands in excess of what it believed it could justify. Any unreasonable claims would injure the Society's case, and would be refrained from on the grounds of expediency and regard for its own reputation. As to costs of arbitration, the Society offered in one case to bear not only its own arbitration expenses, but part of those of the Association concerned.

With regard to the returns required, they are all analysed at Copyright House, and the fees collected are divided on a points basis taking due account of the length and nature of each work performed. In the classification system on which points are awarded a distinction is made between the different qualities of the music performed.[1] As regards the musical works not performed by the licensee, there does not seem any logical reason why there should be any question of rebate. He has the liberty under the licence to perform any and every work in the Society's repertoire, and if he performs any other work why should he be compensated?

As to the question of lists, this would appear to be a theoretical grievance, because nearly all music that is required for public performance is in the hands of the Performing Right Society. Lists confined to popular music would have to be published weekly, and within a year or less would be virtually useless. Associations and individual licensees have been invited to inspect the index at the head office. The Society's repertoire department deals with inquiries as a matter of routine and without charge.

Faced with this conflict of evidence the Copyright Committee set up in 1951 has made no positive statement as to its finding, though they are conscious of the validity of the criticisms of the way in which the Society can establish and enforce new tariffs. Further, the Society is in an abnormally strong bargaining position and could enforce its tariffs against any opposition. The mere existence of this power, however it is exercised, is likely to lead to doubts and suspicions about the justice of the tariffs. A tribunal,[2] therefore, is recommended with two possible functions. If the Performing Right Society loses its unrestricted right to control and prevent the use of copyright material for public performance, the tribunal should have power to review and revise tariffs actually in operation, make new tariffs where none exist, and determine whether the refusal to grant licences is detrimental to the public interest, and if so grant licences as of right. If, on the other hand, the Society is allowed to continue to impose its own conditions of licensing, the tariffs would merely be open to review in cases where licences had been issued, or an offer to issue a licence had already been made.

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[1] In the U.S.A. the system evolved by ASCAP is that a committee of twelve songwriters assess themselves and their colleagues quarterly on the basis of popularity and prestige, the merit of their works, and the relative number of times their compositions are performed. Any member dissatisfied with his rating can appeal to a Board of Appeals and thence to the entire Board of Directors. Half of the annual net income is paid to the composer groups, and half to the publisher groups. Distribution to writer members ranges from $20 per year in the lowest class to $19,000 in the highest class. A top publisher may receive as much as $200,000 per year. *Variety,* April 9, 1949, p. 19, col. 1.

[2] It is recommended that the Chairman, if not a High Court judge, should at any rate be a barrister of standing appointed by the Lord Chancellor. Other members should be appointed by the President of the Board of Trade. The exact number to be chosen would be assessed on the basis of experience.

It is to be emphasised that the Committee prefers some sort of machinery whereby only disputed matters would be reviewed. It may therefore be of interest to consider the corresponding position in Canada. By the Copyright Amendment Act, 1931,[3] any performing right society desiring to collect fees, charges or royalties during the next ensuing calendar year must file its tariffs with the Minister at the Copyright Office on or before November 1st[4] in each year. If such a tariff is not filed, no action, however constituted, may be brought to enforce any remedy for infringement of performing rights claimed by the society unless the Minister's consent is given in writing.[5] The Minister must publish the tariff in the *Canada Gazette*, and all objections must be lodged with him.[6] These are then dealt with by a Copyright Appeal Board,[7] which has power to consider any fees proposed and make alterations therein.

In the U.S.A. control of the activities of ASCAP[8] has taken a different form. The problem has been to strike a balance between the monopoly granted by the Copyright Act of 1909 and the monopolies forbidden under the Federal anti-trust laws. In 1948 ASCAP was labelled a monopoly in violation of the Sherman Act[9] in unmistakable language in *Alden-Rochelle* v. *ASCAP,*[10] yet it is an organisation whose primary purpose is beneficial and the only practical means of ensuring the enforcement of the copyright law provisions whereby individual composers are enabled to get their just reward. The 'rule of reason' of the Sherman Act might have been relied on if an appeal had been lodged,[11] but ASCAP negotiated with the Government and a consent decree was issued in 1950.[12] The terms are that ASCAP cannot interfere with the right of any of its members to issue non-exclusive licences to any potential licensee in the U.S.A. It may not discriminate as to tariffs between licensees similarly situated. Its contracts must not exceed five years in duration, and it cannot prohibit any of its members from withdrawing from the organisation. Any licensee has the right to use all music belonging to ASCAP. The complete repertoire of the music available must be compiled and available for public inspection. Radio networks are to be licensed on a unit basis, not on an individual station basis. One licence is to cover all motion picture performance rights for a year at a time. In the case of radio stations fees may not be based on a percentage of income from programmes which do not use ASCAP music, unless the broadcaster so desires. If the potential licensee and ASCAP are unable to agree on terms within sixty days the Court can determine what is a reasonable fee. Any fee thus fixed is a guide for all similarly situated licensees who shall be licensed after the determination by the Court.[13] Full powers are given to enforce compliance.[14]

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[3] C. 8, as amended by section 2 of c. 28, 1936, and section 1 and section 4 of c. 27 of 1938. The general purpose of the Acts is set out by Duff, C.J., in *Vigneux et al.* v. *Canadian Performing Right Society Ltd.* (1943) 3 Fox Pat. C. 77, at p. 79.

[4] Section 10 (2).

[5] Section 10 (3).

[6] Section 10A (1).

[7] Section 10A (2). The Board consists of three members who shall be appointed by the Governor in Council. One of the members shall be a person who holds or has held high judicial office, and he shall be the Chairman of the Board. The other two members of the Board shall be selected from officers of the public service of Canada. Section 10B (1) (2).

[8] The chief society—founded in 1914 by a group of composers including Victor Herbert, John Philip Sousa, and Gene Buck. Other societies are Broadcast Music Incorporated, and Society of European Stage Authors and Composers Inc. The powers of ASCAP were developed in the following cases: *Herbert* v. *Shanley* (1917) 242 U.S. 591; *Irving Berlin Inc.* v. *Daigle,* 31 Fed. 832 (5th Cir. 1929); *Dreamland Ball Room Inc.* v. *Shapiro, Bernstein & Co.,* 36 Fed. 354 (7th Cir. 1929); *M. Witmark & Sons* v. *L. Bamberger & Co.,* 291 Fed. 776 (D.N.J. 1923); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.* (1925) 269 U.S. 556; *Jerome Remick & Co.* v. *General Electric Co.,* 16 F. 2d 829 (S.D.N.Y. 1926); R. I. Goodman, *Music copyright associations and anti-trust laws* (1950), 25 *Indiana Law Journal,* pp. 168–184; L. C. White, *Musical copyrights* v. *anti-trust laws* (1950), 30 *Nebraska Law Review,* pp. 50–67.

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[9] Section 1 of the Sherman Anti-Trust Act, 15 U.S.C., § 1 provides: 'Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce . . . is declared illegal'.

[10] 80 F.Supp. 888 (S.D.N.Y. 1948).

[11] *Standard Oil Co.* v. *United States* (1911) 221 U.S. 1; *Appalachian Coals* v. *United States* (1933) 288 U.S. 344.

[12] *United States* v. *ASCAP,* CCH Trade Reg. Rep. § 62595 (S.D.N.Y. 1950) (Civil Action No. 13-95, filed March 14, 1950). A similar decree was issued dealing with foreign and international aspects of ASCAP: *United States* v. *ASCAP,* CCH Trade Reg. Rep. § 62594 (S.D.N.Y. 1950) (Civil Action No. 42–245, filed March 14, 1950). There can now be no discrimination among foreign societies by ASCAP. ASCAP may not participate in any international organisation of performing rights societies which has as its purpose the allocation of areas for control or the elimination of competition between societies. ASCAP must not interfere with the right of any of its members to issue non-exclusive licences in any area outside the United States; see *New York Times,* March 15, 1950, p. 34.

GRAMOPHONE COMPANIES AND THE PUBLIC PERFORMANCE OF THEIR RECORDS

Under section 19 of the Copyright Act, 1911, it was provided that copyright should subsist in records in like manner as if such contrivances were musical works, although for a different period from the original work. This right protected the record from being copied, but it was not until 1933 that the Court interpreted this section as conferring a performing right as well.[15] Improvements in the technique of recording since 1911 have led to the extensive use of records in hotels and restaurants, and when the new power was given the gramophone record manufacturers formed a company called Phonographic Performance Ltd. to exercise control on their behalf. Its purpose can be summarised in the following way:—

(1) to secure financial reward for the public use of records by persons for their own commercial profit, because it is the view of the manufacturers that records are made for use in the home;

(2) to restrict and limit such public use in so far as it should be found necessary in order to prevent injury to the primary business of the manufacturer, *e.g.*, by overplaying of records;

(3) to prohibit entirely such public use in special cases and for special reasons, *e.g.*, to ensure good relations with the artists and musicians whose services they employ; and

(4) to ensure that such public use should not be the subject of abuse, *e.g.*, that records are to be used with due respect for their artistic qualities.[16]

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[13] The Court's order does not affect previously negotiated contracts.

[14] The Department of Justice may investigate books, ledgers and accounts of ASCAP, interview the society's officers, and require reports to be made.

[15] *Gramophone Co., Ltd.* v. *Carwardine & Co.* [1934] 1 Ch. 450; 50 T.L.R. 140.

[16] To prevent a record by a famous symphonic orchestra being used merely as a stop gap between two programmes and subjected to ruthless cutting out in the middle of a phrase or movement.

The question has arisen as to whether the power has been exercised generally in a way the legislature could have contemplated, or whether copyright issues have been the main determining consideration in the settlement of individual cases.

Arguments against the continuation of the virtual monopoly acquired by Phonographic Performance Ltd. have taken various forms. It is said that the giving of the performing right was not the intention of the section, which was based on the recommendations in the Copyright Report of 1909. Again, it is suggested that a gramophone record is not a proper subject of copyright, and that it is merely one form of industrial property. Further, no financial hardship to the companies would result from doing away with the section. Whereas the Performing Right Society is always willing to grant a licence, Phonographic Performance Ltd. licences are withheld or withdrawn for reasons which are far removed from any question of copyright,[17] or for no reason given whatsoever. Rates are fixed in an arbitrary fashion without any provision for an independent review. Non-commercial users, *e.g.*, the Y.M.C.A. and Youth Clubs, complain that national licences were once issued to various voluntary organisations to cover the activities of all their branches, but these have been withdrawn, and Phonographic Performance Ltd. will now only deal with the local branches themselves.

The Copyright Committee concludes that the stringency of control springs from the relations which exist between the gramophone companies and the Musicians' Union. The Union is not so much concerned with fees as with the question of control, because any increase in recording might lead to a distinct downward trend in employment in the profession. If this happened, performers would almost certainly cease to record, and a similar situation to that in the U.S.A. in 1948, where no records were made for two years, might be repeated here. Some protection for the musicians is clearly necessary.

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[17] A notice on the face of the application form states that licences are not obtainable to authorize the use of records at dances or other functions at which bands have been previously or are normally engaged. The licence when issued is subject to the conditions that the record must not be played if to the knowledge of the licensee a trade dispute directly affecting the rights of interests of musicians, as such, is in existence or threatened or contemplated unless such trade dispute is unaffected by the licence. No record must be played in complete or partial substitution for musicians employed, or where musicians would have been employed but for the exigencies of war or national emergency, or where musicians could, having regard to the size and nature of the premises, be employed.

Various solutions to the problem can be put forward. A tribunal, as the committee suggests, could be set up to review the tariffs, but why should the Union necessarily accept its decision? In America payment is made to the American Federation of Musicians by the record manufacturers and the transcription companies calculated as percentages on the sale price of the record. It produces millions of dollars which go into a special fund, from which musicians, whose employment opportunities are lost owing to the use of recorded music, are paid to give free performances to the public. This method amounts to a tax on the record, and the wage-earner who wants a record for use in the family circle pays the same price as the radio station or dance hall. Possibly two types of record could be manufactured—one for private and one for public performance—more being paid for the latter. The Dramatic Performers Act, 1925, could be modified so that any one playing a record publicly would contravene the Act if he did so without the consent of the performer. This however is only a partial solution because the performers wish to control the public use of *all* records.

COPYRIGHT IN THE TELEVISION OF SPORTING SPECTACLES

The position with regard to the television of sporting spectacles is that no copyright is vested in the promoters. The only right that they have is the common law right to exclude the television cameras from the premises where the meeting is being held. There is no legal right to prevent transmission by a camera, which is placed outside and fitted with a telescopic lens, though naturally the quality of the picture will seriously suffer as a result. Further, if the event takes place on an unenclosed common, it is quite impossible for the promoters to take any effective steps to prevent the B.B.C. from televising it.[18] This very nearly happened in 1938 in the case of the Derby. The

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[18] The position would be similar in the case of broadcasting and photography. See *e.g.*, *Victoria Park Racing & Recreation Grounds Co.* v. *Taylor*, 37, S.R. 322 (New So. Wales, 1936) (broadcasting of race results from adjoining land); *Rudolph Mayer Pictures Inc.* v. *Pathé News, Inc.*, 235 App.Div. 774,255 N.Y. Supp. 1016 (1st Dept. 1932) (pictures of boxing match taken from overlooking building).

B.B.C. applied for permission for television facilities, but these were refused, and they then proposed to televise from outside the promoter's property, from the railway station at Tattenham corner. The Epsom Grandstand Association Ltd. decided that whatever say they had in the matter, the Derby would in fact be televised either on their property for a fee, or outside their property without a fee, so they had to give way, and the race was televised. Nowadays, however, the B.B.C. have given an undertaking that no event, not even the Derby, will be televised without the promoter's willing consent, but this undertaking could be withdrawn at any time.

The promoters at the present time feel that inadequate recompense is given to them for the right to televise. Approximately 100 guineas is paid for the right to televise meetings held under the auspices of the Amateur Athletic Association. £250 is paid in the case of a first-class tennis match.[19] It is clearly necessary for increased payments to be made, even though these may have to be met by a levy from viewers in the form of a higher licence fee. The effect of television on attendances is often said to be highly speculative, but at least the promoter must be reasonably protected. It is not only the effect on the event that is being televised that must be considered, but in addition the effect on all other events taking place at that time. In 1951 in New York the Robinson–Turpin fight was not televised except to a closed circuit outside the area, and attracted 61,000 people. The Maxim–Murphy contest was televised, and only 9,000 people paid for admission.

As the law stands now, there is nothing to prevent rediffusion of B.B.C. television programmes in cinemas by enlarging the image from a normal receiving set and projecting it on to a large screen.[20] The Postmaster-General, however, might revoke the holder's licence, because programmes by the terms of the licence are for home use only. All that would then happen would be that his friend would take out another licence in his own name, possibly for the same set! This state of affairs applies to sets in public houses and hotel lounges where the managers have installed them to attract custom at the expense of the promoters.[21]

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[19] In America as much as $150,000 has been paid for the television rights in one boxing contest. The B.B.C., however, agreed to pay £1,000 for the right to televise the F.A. Cup Final; *The Times* newspaper, February 26, 1953, p. 8.

[20] This has not yet taken place, but there is no reason why it should not. Some cinemas including the Odeon, Leicester Square, have been fitted with facilities for closed circuits, *e.g.*, as at the fashion show at the premiere of the film 'The Importance of Being Earnest' on June 26, 1952.

The Association for the Protection of Copyright in Sport was formed in 1944 (1) to ensure that it receives a share of whatever profits are made from the public performance of any television of the sporting spectacle its members might produce; and (2) to be able to ensure a measure of control over such public performances. A draft Bill was submitted by them to the Television Advisory Committee, and was to give the promoter 'of any spectacle' exclusive rights in television. For this purpose 'spectacle' was to include 'any exhibition, display, sporting contest, entertainment or parade, organised by any person, firm or company with a view to its being seen by members of the public'. The definition did not restrict the right to promoters of entertainments which the public could only see in enclosed places or on payment, and further not only sporting events but all spectacles, *e.g.*, the Lord Mayor's Show would be similarly protected.

This same Bill was mentioned to the Copyright Committee by the Association. The Committee, however, are against giving such a copyright because 'there would grow up around the public performances of television a thick hedge of licences which would be required from many associations of copyright owners (as well as from individuals) with inevitable complaints and confusion in the minds of the public'. Accordingly they feel that the best course is to recognise only one performing right in the broadcasting authority emitting the programme. But would the B.B.C. really be willing to spend public money on behalf of the promoters in litigation against alleged infringers of the copyright in the television performing right? Would the tribunal, that the Committee suggests should see that the scales to be fixed by the B.B.C. for rediffusion in cinemas were fair, find favour with the promoters?

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[21] 'We object to people going to a hall and seeing the Cup Final for 2/6, or going to the Savoy Hotel on the occasion of a big fight allotting a room on the ground floor and getting the residents together. They did not charge for that, but it is an added amenity for the Savoy Hotel and we feel we should be protected from the outside competition' (Sir Arthur Elvin). Minutes of Evidence given before the Copyright Committee, September 25, 1951, on behalf of the Association for the Protection of Copyright in Sport.

What then is the Association to do in the absence of banning television of all sporting events for the home viewer?[22] One possible solution is to play copyright music throughout the transmission, so that any rediffusion for public viewing will constitute an infringement of copyright in the music. But the only real remedy lies in the introduction of sponsored television where sponsors would compete for the services of the promoters.

In the U.S.A. arguments have been put forward that unauthorised television broadcasts of sporting events can be restrained on the ground that they constitute unfair competition, but this doctrine is as yet unknown to English law.[23] The arguments are based on the view that *International News Service* v. *Associated Press*,[24] a case in which the International News Service were restrained from publishing in western newspapers information gathered by the Associated Press for publication in eastern newspapers, is of wide application. It is said that this case, though decided on the ground of 'passing off', is applicable to all cases in which a person has reaped reward from another person's efforts and expenditures. If this is so, the promoter could succeed if he could prove competition, damage and a quasi-property right in the sports event. As to competition, by having sets in public halls it might be said that there is competition for public time, because the commercial sponsor would like to have the public at home, listening to all the programmes of the evening. As to damage, the promoter might prove that he is losing at the box office and also that he is less able to sell the cinematograph rights.[25] As to his quasi-property right, it seems that this exists in the promotion of the event, for it is the promoter who has provided the stadium and brought the participants together.[26]

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[22] The closed circuit system for cinemas is bound to develop rapidly as soon as the necessary equipment can be installed.

[23] See D. M. Solinger, *Unauthorised Uses of Television Broadcasts*, (1948) 48 *Columbia Law Review*, pp. 848–875, and *Property right in a sports telecast*, (1949) 35 *Vanderbilt Law Review*, pp. 246–263.

[24] (1918) 248 U.S. 215. Though it was not extended beyond its precise facts in *R.C.A. Mfg. Co.* v. *Whiteman*, 114 F. 2d, 86 (C.C.A. 2d, 1940), and is not regarded as law in some states, *Soft-Lite Lens Co.* v. *Ritholz*, 301 Ill.App. 100, 21 N.E. 2d, 835 (1st Dist. 1939).

[25] *Louis* v. *Friedman*, Equity No. 1804, Pa.C.P., June 23, 1948; *Louis* v. *Richman*, Equity No. 1803, Pa.C.P., June 23, 1948.

[26] *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F.Supp. 490 (W.D.Pa. 1938); *Rudolph Mayer Pictures Inc.* v. *Pathé News Inc.*, 235 App.Div. 774, 255 N.Y.Supp. 1016 (1st Dept. 1932).

THE DOCTRINE OF MORAL RIGHT

With the possibility of early reform of the copyright law arises the question as to whether the doctrine of moral right should be incorporated in new legislation, for express mention of it is made in Article 6 of the Brussels Convention of 1948, which has been signed by this country but not yet ratified. This Article provides that:—

'(1) Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work, and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work, which would be prejudicial to his honour or reputation.

'(2) In so far as the legislation of the countries of the Union permits, the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained at least until the expiry of the copyright, and shall be exercisable by the persons or institutions authorised by the said legislation'[27]

The doctrine of moral right is the product of continental jurisprudence, and has received little support in the Anglo-American systems. A general guide as to its meaning is supplied by a French writer who has described it as 'the right of the author to create, or not to create, to present the creation to the public in a form of his choice, or to withhold it, to dispose of this form as he alone desires, and to demand that his personality be respected in so far as it relates to his status as an author'.[28]

A recent report by the Copyright Division of UNESCO as to the treatment of moral right in forty odd countries,[29] divides the question into a series of heads: (1) 'The Right of Secrecy'; (2) 'The Right to Assert the Authorship of the Work'; and (3) 'The Right to Integrity of the Work'. With regard to the 'Right of Secrecy' it was found to be generally recognised that the work remained the author's until he consented to divulge it. A number of rights make up the category of 'The Right to Assert the Authorship of the Work'. If the authorship of a work is contested, or if the work is attributed to another person than its true author, the latter has the right to assert that he is the author. The author has the right to require that his name appear on each copy of his book, and that his name be announced at each presentation and performance of his work. He has the right to protest the application of his name to the work of another, or a representation of a copy of his work as the original work. He has the right to protest the substitution of another's name for his own on his work. He may require that his anonymity or *nom de plume* be respected. Script writers of films may require that their names appear at showings of the film. The author may require that when excerpts from his work are used, the source, with mention of his name, be indicated.

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[27] No country of the Berne Union has complained that the United Kingdom during the last twenty odd years has failed to discharge its obligations under the corresponding Article of the Rome Convention.

[28] Michaelides-Nouaros, *Le Droit Moral de l'Auteur* (1935), p. 68.

[29] UNESCO Copyright 58–68 (Nos. 2–3, 1949).

Under the 'Right to the Integrity of the Work' no one without the consent of the author has the right to modify either the form, or the contents, or the title of the work. Particularly this denies the right to alter, to abridge, to delete, to deform, to mutilate or to distort the work. A person or organisation authorised to present or perform a work may not transfer this right to another enterprise, nor cause it to be performed by incompetent artists. A work may not be presented in a form obviously inappropriate to it, neither can it be inserted in an anthology or exhibited as part of a collection, if the author does not wish his work to appear in the company of that of the other authors represented. Any interpolation must be clearly indicated.

Other rights which are not as generally accepted include (1) the right to correct: which includes the author's right to make corrections as new editions are prepared; (2) the right to retract, *i.e.,* to withdraw the work from public sale, provided that an indemnity is paid to the publisher; and (3) the right to reply to criticisms of his work at the cost of the critic and/or of the organ in which such criticism was published.

Opponents of the view that the doctrine of moral right should be expressly included in English law rely on the fact that so many elements of the doctrine are already sufficiently protected. The author of an unpublished work is specifically guarded under the Copyright Act, 1911, s. 1 (1) and sometimes he can restrain the use of his works on the ground that it is a breach of trust or confidence.[30] In American law it has been held that creditors cannot levy execution against an unpublished manuscript and publish it,[31] nor may the purchaser of an unpublished work at a bankruptcy sale do so.[32]

With regard to the right to assert the authorship of the work, in *Lord Byron* v. *Johnston*[33] the Court granted a temporary injunction where the defendant advertised for sale certain poems falsely stated to have been written by the plaintiff. Under the Fine Arts Copyright Act, 1862, s. 7, penalties are imposed for fraudulent alteration of works of art, and on those who knowingly sell them as the unaltered work of the author.[34] In *Archbold* v. *Sweet*[35] the author of the famous work on criminal procedure was awarded damages where a publisher had published a third edition of the work containing many deformities, with the plaintiff's name published ambiguously on the cover, on the ground that the publisher had attempted to pass off the work as the plaintiff's. In *Lee* v. *Gibbings*[36] the index and preface were similarly protected. Protection too is afforded under the law of libel. A paper jacket or cover in which books are issued to the public conveying by its vulgar and offensive character the suggestion that the contents of the book are also vulgar and offensive, has been held to be a libel on the author, and the publisher may be restrained from continuing to issue a book with such a cover.[37] In an American case, *Harris* v. *Twentieth Century Fox Film Corporation*[38] the plaintiff had sold all rights in a story written by her to the defendants who made it into a film and gave the exclusive screen credit to a third party. The Court, however, seems to have held that this was not libellous *per se,* and without a pleading of special damages, not to constitute libel. Sometimes in American law protection may be obtained under the doctrine of unfair competition as in *Prouty* v. *National Broadcasting Co.,*[39] where the defendants broadcast without authority scenes in the life of the heroine of the plaintiff's book. It is also averred that ample protection can be afforded to the author by the insertion of the appropriate terms in his contract when he assigns his copyright.

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[30] See *e.g., Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25; *Webb* v. *Rose* (1732), cited 4 Burr. 2330; *Macklin* v. *Richardson* (1770) Ambl. 694; *Gilbert* v. *Star Newspaper Co.* (1894) 11 T.L.R. 4; *Doyle* v. *Wright* (1930) Macg.Cop.Cas. 1.

[31] *Bartlett* v. *Crittenden,* 2 Fed.Cas. 967, No. 1,076 (C.C.D. Ohio, 1849).

[32] *Berry* v. *Hoffman* (1937) 125 Pa.Super. 261, 189 Atl. 516.

[33] (1816) 2 Mer. 29.

[34] *Carlton Illustrators* v. *Coleman* [1911] 1 K.B. 771; *Preston* v. *Raphael Tuck* [1926] 1 Ch. 667.

[35] (1832) 1 M. & Rob. 162.

[36] (1892) 67 L.T.N.S. 263. See also *Forbes* v. *Kemsley Newspapers* [1951] 2 T.L.R. 656; *Landa* v. *Greenberg* (1908) 24 T.L.R. 441; *Hines* v. *Winnick* [1947] Ch. 708; *Marengo* v. *Daily Sketch & Sunday Graphic Ltd.* (1948) Macg.Cop.Cas. 18.

[37] *Mosely* v. *Stanley Paul & Co.,* Macg.Cop.Cas. (1917–1923) 341; See also the Irish case of *Gibbings* v. *O'Dea & Co., Ltd.,* Macg.Cop.Cas. (1948–1949) 31.

[38] 43 F.Supp. 119 (S.D.N.Y. 1942). See also *Locke* v. *Benton & Bowles Inc.,* N.Y.L.J., December 22, 1937, p. 2309; A. S. Katz, *The Doctrine of Moral Right and American Copyright Law: A Proposal* (1951), 24 *Southern California Law Review,* pp. 375–427.

Yet there are still many circumstances in which the author is left unprotected. It is difficult to see how the law of libel can be invoked to protect creators of non-literary works, and deformation of works after the death of the creator cannot thereby be prevented. Unless there is a specific term in the contract to the contrary, there is nothing to prevent a purchaser of a serious musical composition from performing it in swing-time.[40] The author's reputation can be seriously impaired if his music is recorded by a poorly rehearsed musician, and he has no redress in the absence of a contract. No redress could be afforded in the American case of *Shostakovich* v. *Twentieth Century Fox Films*[41] where the music of Russian composers was used in a film[42] exposing the activities of Russian secret agents in foreign countries. The Court observed that there arose the question of the norm by which the use of such work was to be tested to determine whether or not the author's moral right as an author had been violated. Was the standard to be good taste, artistic worth, political beliefs, moral concepts or what was it to be? In the present state of the law the very existence of the right was not clear, the relative position of the rights thereunder with reference to the rights of others was not defined, nor had the nature of the proper remedy been determined.

Once an author has parted with the copyright nothing, in the absence of a term in the contract, can prevent the publisher refraining from publication until some later date when he can

[39] 26 F.Supp. 265 (D.Mass., 1939).

[40] Cf. *Stravinsky* v. *Société Warner Brothers, First National Films,* Tribunal Civil de la Seine, July 27, 1937; Droit d'Auteur 107, September, 1938.

[41] 196 Misc. 67, 80 N.Y.S. 2d, 575 (Sup.Ct. 1948), affd. mem., 275 App.Div. 695, 87 N.Y.S. 2d, 430 (1st Dept. 1949).

[42] 'The Iron Curtain'.

have the author at his mercy by threatening to publish the work in such a way that his reputation can be prejudiced, *e.g.*, twenty-five years later when the author's style may have vastly improved since his early writings.

The Copyright Committee conclude that in general many of the problems involved do not lend themselves to cure by legislative action, but are of a type that can best be regulated by contract between the parties concerned. This is certainly true in the case of film interests, because they might be placed in a serious position if contracts concluded by them did not represent the full extent of their obligations. If authors were given overriding rights by legislation to interfere with the adaptation of their work in films, the film producer would be severely handicapped in the exercise of his art in the course of which he makes, of his own creation, a new and original work involving amongst other things the development and welding together of the original contributions of others. The Committee may very well stress that the rights which the author wants can be protected by contract, but they do not appear to take into consideration the weak bargaining position which he possesses. Any author, who was not well established, could never insist on a publisher signing a contract containing special terms in favour of the former and would merely be told to go elsewhere. In fact the majority of the well-known publishers have standard forms, which the author has no option but to sign. A small degree of protection, however, may be provided if legislation gives effect to the recommendation that where a contract requires the production of a work for a specific purpose, the author shall, in the absence of agreement to the contrary be deemed to have the right to restrain its use for any other purpose. Thus, if a sketch has been commissioned for illustration of a magazine story, it should not be used as an advertisement for a commercial product without the author's permission.

INTERNATIONAL COPYRIGHT PROTECTION

Most of the smaller countries in the world are members of the International Copyright Union established by the Berne Convention of 1886, as later amended.[43] The United States, China and Russia are among the Great Powers which are not signatories. The general principle is that if an author's work is first published in a member country, or published there simultaneously[44] with publication in a non-member country, it receives protection in all member countries. The enjoyment and exercise of copyright are not subject to the performance of any formality, and are independent of the existence of protection in the country of origin of the work. Consequently apart from the express stipulation of the Convention, the extent of protection as well as the means of redress secured to the author to safeguard his rights is governed exclusively by the laws of the country where protection is claimed.

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[43] Amendments have been made by the Additional Act of Paris in 1896, the Berlin Convention of 1908, the Rome Convention of 1928, and the Brussels Convention of 1948.

A paramount provision is that the term of copyright is to be for the author's life and for fifty years after his death.[45] Protection covers 'literary and artistic works', which term includes every production in the literary, scientific and artistic domain whatever may be the form of its expression. The author has the exclusive right of authorising a translation during the entire period of the copyright term.[46]

Countries in the American Continent can join the Pan-American Convention,[47] though there is nothing to prevent a country also being a member of the Berne Union. The acknowledgment of a copyright obtained in one State in conformity with its laws, produces its effects of conferring full right in all the other States without the necessity of complying with any other formality, provided that there appears in the work a statement that indicates the reservation of the property right.

Authors who are citizens of countries which are not members of the Berne Union have taken advantage of the Berne Convention by getting their works published in a member country, and it is sometimes suggested that all such rights should be withdrawn, unless their own country comes into the Union, or at least adopts the same term of copyright, and complies with other rules and conditions adopted by the Union.

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[44] The Brussels Convention states that 'a work shall be considered as having been published simultaneously in several countries which has been published in two or more countries within 30 days of its first publication': Article 4 (3).

[45] In the case of anonymous or posthumous works the term of fifty years from the date of publication. The Brussels Convention provides that in future such terms shall always be deemed to begin on January 1 of the year following the event which gives rise to them: Article 7 (6).

[46] See generally, E. R. H. Ivamy, *The Brussels International Copyright Convention,* (1950) 17 *The Solicitor,* pp. 15–18.

[47] The principal Convention is the Buenos Aires Convention 1910. Other Conventions are the Habana Convention 1926 and the Washington Convention 1946.

The reasons why the United States has not joined the Berne Convention are that the term of their own copyright protection is shorter, and further that their compulsory manufacturing provisions must be complied with. These provisions are that to gain protection the text of all books and periodicals must be printed from type set within the limits of the United States, or from plates made within the limits of the United States from type set therein, or if the text is produced by lithographic or photo-engraving process, then through a process performed wholly within the United States. These provisions apply only to works in English. But fifteen hundred copies of books of foreign origin in English may be imported within five years of publication, if each copy contains notice of copyright and if *ad interim* copyright has already been obtained. A further obstruction to joining the Union is that a number of formalities are required by United States law before copyright is granted, *e.g.,* a notice on the title page and page immediately following, and the deposit of two copies at the Copyright Office.

It was with a view to reconciling these differences that for five years the Copyright Division of UNESCO has been working on a draft of a Universal Copyright Convention as a bridge between the two systems. The Convention has now been signed by thirty-six countries, including the U.S.A. and this country. The principal provisions are that no formalities need be complied with except that the symbol © accompanied by the name of the copyright proprietor and the year of first publication must appear. Publication, *i.e.,* 'the reproduction in tangible form and general distribution to the public of copies of a work from which it can be read or otherwise visually perceived', is all that is required. Thus gramophone records and broadcasting are outside the scope of the Convention. The copyright term is to be not less than the life of the author and twenty-five years, subject to certain exceptions, but a right to forbid translation lasts for seven years, though a compulsory licence to translate may be obtained if certain conditions are fulfilled.

This country would appear to have nothing to lose by ratifying the Convention and the only legislation that would appear to be necessary is that all works should contain the copyright symbol if protection is required. Indeed everything is to be gained if the United States can be persuaded to make the necessary changes in her own laws to bring them into line with the new Convention. The manufacturing clause provisions are still a serious obstacle, and it remains to be seen whether Congress will look with favour on an attempt to repeal them.

11

THE DEFENCE OF NECESSITY

Glanville Williams

The defence of necessity is not so much a current as a perennial legal problem. The Chinese sage Mencius, a contemporary of Plato and Aristotle, was asked by K'wăn: 'Is it the rule that males and females shall not allow their hands to touch in giving or receiving anything?' Mencius replied: 'It is the rule'. K'wăn asked: 'If a man's sister-in-law be drowning, shall he rescue her with his hand?' Mencius said: 'He who would not so rescue the drowning woman is a wolf. For males and females not to allow their hands to touch in giving and receiving is the general rule; when a sister-in-law is drowning, to rescue her with the hand is a peculiar exigency'.[1]

Notwithstanding the doubts expressed by some modern writers, one can say with some assurance that the defence is recognised by English law. This does not even need judicial authority; it can be proved by a hypothetical example. P is rendered unconscious in an accident, and an immediate operation is necessary to save his life. D, a surgeon, performs this operation; afterwards P ungratefully prosecutes him for assault. What defence has D? Not the surgeon's usual defence of consent, for here P was unconscious throughout. D's only defence is that of necessity, and it can hardly be doubted that this is open to him.

Of course, if P had been conscious and positively refused his consent, necessity would have been no defence. One cannot operate on a person against his will, though one can for adequate reason operate on him without his will.

Necessity may even excuse an interference with a conscious person. The other day I witnessed the following incident. X was cutting down a heavy branch over a road; D was stationed to warn the public of the impending fall. P, a cyclist, saw that D was trying to stop him, but did not appreciate the reason and (being in a hurry) tried to pass. To prevent P riding into the danger area, D seized P's bicycle and caused him to stop. D was clearly justified in what he did; yet P was conscious and did not consent to the interference. D's justification rested upon necessity. It would merely be verbiage to say that it rested upon a fiction of P's consent.

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[1] *Chinese Classics* (ed. James Legge, 2nd ed., 1895), Vol. 2, p. 307.

There is a train disaster in lonely country; many passengers are injured; the guard breaks the window of a golf house in order to gain access to it to open it up as a first-aid post. It would be obvious to any one, except possibly a lawyer, that the act is justified by necessity.

When I started to prepare this lecture I thought of necessity as a definite kind of defence, occupying its own niche in the law. But the authorities led me into unexpected paths. Works like Bacon's *Maxims,*[2] Viner's *Abridgement,*[3] and Blackstone's *Commentaries,*[4] treat the wife's defence of coercion as an instance of necessity, as well as duress, self-defence and the force necessarily used in arresting felons. The medieval practice of beating lunatics was said to be based on the necessity of the case[5]; so also the liberty to abate a nuisance,[6] and the rule that when a document is lost, secondary evidence can be given of its contents.[7] Even the defence of act of God is placed by these early writers on necessity. Then one thinks of the wife's agency of necessity, the right of way of necessity, and the public right to walk upon land adjoining the highway when the highway is foundrous.[8] In a manner of speaking the whole law is based upon social necessity; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable needs. Obviously our present concern is with something narrower than this. What we have to study is how far the notion of necessity can create new rules or serve as an excuse for dispensing with the strict law where the exigency requires it.

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[2] (1630), Reg. 5, p. 25; copied by Noy, *Maxims* (1641), para. 25; Hawke, *Grounds of the Laws of England* (1657), p. 339; Anon., *Grounds and Rudiments of Law and Equity* (1749), pp. 216–217, 290.

[3] Vol. 15, p. 534, tit. *Necessity.*

[4] Vol. 4, p. 28 *et seq.*

[5] Bacon and Hawke, quoting Y.B. (1349) 22 Ass. pl. 56.

[6] Y.B. (1469) M. 9 E. 4, 35a pl. 10 (scouring out a gutter to prevent flooding).

[7] Jenk. 19, 145 E.R. 15; Viner, *Necessity* (B). Viner gives several other curious illustrations, such as the rule that an acquittance given by an infant executor is good, because of the necessity of the case, for otherwise the obligee would not be bound to pay.

[8] Based upon the general good and the necessity of the case in *Taylor* v. *Whitehead* (1781) 2 Dougl., at p. 749, and *Bullard* v. *Harrison* (1815) 4 M. & S., at p. 393. The rule has not been extended to private rights of way: *Bullard* v. *Harrison.*

The classical writers abound in maxims upholding the plea of necessity. Bracton declares that what is not otherwise lawful necessity makes lawful: *id quod alias non est licitum, necessitas licitum facit.*[9] To the same effect Britton: *Necessitas vincit legem*[10]; Serjeant Pollard: *Necessitas non habet legem*[11]; Bacon: *Privilegium non valet contra rempublicam*[12]; *Salus populi, suprema lex*[13]; Coke: *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur; Interest reipublicae quod homines conserventur; Conservatio vitae hominis est bonum publicum*[14]; Hale: *Necessitas est lex temporis et loci; Quod necessitas cogit, defendit*[15]; Hawke: *Publica utilitas privatorum commodis est praeferenda; Nihil magis est justum quam quod necessarium est*[16]; Hobart, J.: *Necessitas legum vinculum irridere.*[17] Hobart, J., said: 'All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience'.[18] *Per curiam* in *Mânby* v. *Scott* (1672): 'The law for necessity dispenses with things which otherwise are not lawful to be done'.[19] Sir William Scott said in *The Gratitudine* (1801): 'Necessity creates the law,—it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal'.[20]

ILLUSTRATIONS OF NECESSITY

Examples of necessity given in the old books are: pulling down a house to prevent a fire from spreading; jurors departing from the court without leave of the judge because an affray breaks out and they are in peril of death; prisoners leaving a burning jail;

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[9] F. 93b, 247a, quoted in 2 Co.Inst. 326, 5 Co.Rep. 40b, 10 Co.Rep. 61a; Jenk. 19.

[10] Bk. 5, c. 1, s. 6; so also 5 Co.Rep. 40b (introducing the qualification *saepenumero*).

[11] Plowd. 18; so also Fraunce, *Lawiers Logike,* p. 13.

[12] *Maxims,* p. 27.

[13] Bacon, *Maxims,* reg. 12; Bacon's Essay 'Of Judicature'; *Egerton* v. *Earl Brownlow* (1853) 4 H.L.C., at p. 152. The maxim goes back to Cicero, *De Leg.* iii 3, s. 8.

[14] All from *Mouse's Case* (1608) 12 Co.Rep. 63.

[15] 1 Hale P.C. 54; *Garland* v. *Carlisle* (1837) 2 C. & M., at p. 77.

[16] *Grounds of the Law,* pp. 339, 432.

[17] *Colt* v. *Coventry* (1612), Hobart at p. 159.

[18] *Moore* v. *Hussey* (1609) Hob. 96.

[19] 1 Levinz 4.

[20] 3 C. Rob., at p. 266.

and jettisoning cargo to lighten a boat in a storm.[21] In modern times the most striking application of the defence was in *R.* v. *Bourne,*[22] where necessity was held to justify abortion.

In each of these instances life was in danger; and this is the clearest situation for the application of the doctrine. The difficulty of applying it where the need is not so pressing may be illustrated from the reports.

In 1468[23] it was held that sea-fishermen could justify going on the land adjoining the sea, because such fishing is for the common weal, and for the sustenance of all in the realm, and so is common law. But it was added that there is no general right to place stakes in the foreshore for setting nets. The restriction is an artificial one, but is a typical compromise between private right and public interest.

In 1473[24] it was held that for felony or suspicion of felony, a man can break a house to take the felon, for it is for the common weal to take him. But (the Court added) it is otherwise for debt or trespass: the sheriff cannot break a house (*i.e.,* the door of a house) to effect an arrest, for this is only the private interest of the party. It was later decided on the same principle that the sheriff cannot break open the door of a house to execute a *fi. fa.*[25] This is still the law. It seems to be an unreasonable restriction upon the powers of a public officer, and the reason given, that it is only the private interest of the party, is unconvincing. There are several cases, as we shall see, where the doctrine of necessity justifies what is in the private interest of a party.

In 1506[26] the defendant removed the plaintiff's corn from a field because it was in jeopardy of being destroyed by the beasts of third persons that were going about in the field. The defendant was held liable in damages for taking the corn, the special circumstances not being an excuse. This determination was based upon that fact that if the corn had been destroyed the plaintiff would have had his remedy against the owner of the beasts that ate it. It was agreed that had there been no such remedy against third parties, the justification would have been good. Rede, J., said that if my sheep are with another's sheep, I can justify driving them all to a narrow place to separate them, because this is the only way to do it. The actual decision does not seem satisfactory, because no ordinary person would regard a right to damages for the loss of a thing as equivalent to the thing itself. In no other case has it been suggested that the justification of necessity is displaced by the fact that the person whose interest is protected would have a right to damages against a third party.

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[21] The last is *Mouse's Case* (1608) 12 Co.Rep. 63.

[22] [1939] 1 K.B. 687; *supra,* Vol. 5, p. 131.

[23] Y.B., M. 8 E. 4, 19a, pl. 30.

[24] Y.B., P. 13 E. 4, 9a, pl. 4.

[25] *Semayne's Case* (1604) 5 Co.Rep. 91a (expressing various qualifications); *White* v. *Wiltshire* (1620) Cro.Jac. 556; Halsbury, *Laws of England* (2nd ed.), Vol. 14, p. 48. The opposite had been decided in 1325: the sheriff levying execution in respect of damages can break doors, for otherwise execution may be impossible (Fitz. Execution 252).

[26] Y.B., T. 21 H. 7, 27b, pl. 5; cf. Williams, *Liability for Animals* (1939), pp. 67, 99.

Whether necessity justifies hunting has given rise to differences of judicial opinion. In 1520[27] Brooke, J., uttered the following dictum: 'It is said that if I come into your land and kill a fox, a gray,[28] or an otter, I shall not be punished for this entry, because they are beasts against the common profit'. In 1613[29] there was a compromise ruling as to the badger. One cannot justify entering another's land to dig out badgers, even though they be hurtful animals; but if a man starts a badger on his own land, he may pursue it to the land of his neighbour. The last was a dictum, but it has never been questioned; quite possibly it still represents the law.

In 1786[30] the plea of necessity was held to justify fox-hunting over the land of an unwilling farmer. This was overruled in *Paul* v. *Summerhayes* (1878),[31] but the reason given was that foxhunting was a sport, not a serious enterprise for the destruction of vermin. On the balance of authority, and notwithstanding the case of 1613, it is still a tenable proposition that there is a liberty to enter another's land for the purpose of putting down a nuisance by vermin, *e.g.*, rats; at least there seems to be a liberty of pursuit. Rabbits are apparently not vermin.[32]

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[27] Y.B., M. 12 H. 8, 10a, pl. 2.

[28] Badger.

[29] *Gedge* v. *Minne,* 2 Bulst. 60.

[30] *Gundry* v. *Feltham,* 1 T.R. 334, and other authorities there cited.

[31] 4 Q.B.D. 9; some subtlety was used to distinguish *Gundry* v. *Feltham* as being decided solely on the pleadings.

[32] Williams, *Liability for Animals* (1939), p. 240. In practice use will be made of the machinery of the Agriculture Act, 1947, ss. 98, 100, 101, which applies to rabbits, hares and other rodents, deer, foxes, moles, and some wild birds.

Commoners have received somewhat severe treatment from the judges. If the lord deliberately introduced rabbits into the common, the commoner was not allowed to kill the rabbits, even though their introduction constituted an actionable nuisance. Nor could he even drive out the rabbits with ferrets and fill up the burrows.[33] In 1521 there was argument over whether the commoner could dig a trench to drain the common.[34] Brooke and Eliot, JJ., thought not; Pollard and Brudnel, JJ., thought he could. The argument in favour of the commoner was that draining the common was for the benefit of the lord as well as of the commoners. Pollard, J., in accepting this argument, was prepared to go very far in justifying quixotic conduct. 'Our law is founded on the law of God, and what confers a benefit on the other, by the law of God shall not be punished, although the act by itself be tortious. As if I be in peril of being murdered in my close, or in my house, it is lawful for any one to break my house or close to aid me, because it is for my benefit. So if I see beasts in your corn, I can enter to drive them out. So if one be so poor that he cannot plough his own land, if I wish to plough and sow it with corn, and cut his corn, I shall not be punished, because this is for the profit of the other. . . . If one brings me a present, or comes to me for advice, and gives me something for my labour, or visits me when I am sick, he shall not be punished, because even if it was against my wish, still the law intends that I will not be displeased, because it is for my benefit'. Eliot, J., disagreed. He said that it is not lawful to touch another forcibly unless he be in peril, and in no case is it lawful to meddle with his goods or enter his land without his consent. It is not lawful to enter a man's land to drive trespassing beasts out of his corn. If a man gives me licence to walk in his garden which is full of thistles and nettles, it is not lawful for me to cut them down: I must accept the land as it was at the time of the grant. As to tilling a poor man's field without his consent, this might cause him loss if he had intended turning it into a pasture. Pursuing a similar line of argument for the case at bar, Eliot, J., suggested that the trench might have damaged the lord, because he might have wished to make a fishpond there. Brudnel, J., thought it a sufficient answer to this extraordinary argument to say that the lord's intention to construct a fishpond had not been pleaded. He said that if my land is under water I can make a sluice to turn it on to your land; and you can make a similar sluice, until the water gets to a river or ditch.

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[33] Williams, *op. cit.*, p. 238 *et seq.*

[34] Y.B., T. 12 H. 8, 2a, pl. 2; further argument at T. 13 H. 8, 15a, pl. 1.

Later decisions have clarified some of these questions. On the whole the hands-off attitude of Brooke and Eliot, JJ., has prevailed. The law does not encourage quixotry; it frowns on the Robin Hoods of this world. Yet there is no sufficient reason to suppose that conduct undertaken to protect another's property against pressing danger is even technically tortious.

Similar questions have arisen between tenant for life and remainderman. Unlike the commoner, the tenant for life may 'meddle with the soil'. He may dig a trench to carry off water, for this is good husbandry.[35] But he cannot convert wood into arable or vice versa, one reason given being that this might destroy the lessor's evidence of title.[36]

Cases like these, which are treated in the old books as turning on necessity, show how that doctrine becomes particularised in rules of law. It is hard to say where the doctrine of necessity ends and the ordinary rules of property law begin. The decision of some of the cases seems to be motivated in part by a desire to restrict self-help. This is particularly so with the commoner, who is given an action against the lord who surcharges the common with rabbits but is denied any extra-judicial remedy.

It is not clear whether there is any liberty to enter the land of another in order to retake one's chattels.[37] Lynskey, J., ruled that there is no liberty of entry to repair one's building[38]; but the facts of the case were peculiar and the defendants were claiming in effect to appropriate the continuous use of the plaintiff's land. If one is entitled to pull down a house to prevent a fire spreading, it would seem that *a fortiori* one is entitled to enter upon neighbouring land in the course of fighting the fire; and if fire-fighting is allowed, why not emergency operations to prevent the building from collapsing? Thus the liberty of entry may depend upon the urgency of the occasion.

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[35] *Altman's Case* (1578), Dyer 361b.

[36] *Maleverer* v. *Spinke* (1537), Dyer 36b, pl. 40.

[37] Salmond, *Torts* (10th ed.), p. 191.

[38] *Hewlitt* v. *Bickerton, Estates Gazette,* December 6, 1947, p. 421.

Defence against a common danger—such as flood water[39] or locusts[40]—is allowed, even though the result is to increase the affliction to a neighbour. In analysis this seems to be an instance of necessity rather than self-defence, if the latter is taken to mean defence against a wrong.

It hardly needs authority for saying that if in the course of nature harm will be caused to the plaintiff and others, which will be *damnum absque injuria,* and the defendant acts to accelerate but diminish the harm, this is also *damnum absque injuria.* An example in the reports is *Thomas* v. *Birmingham Canal Co.,*[41] where an extraordinary rainfall so flooded a canal that if nothing was done the canal would burst its banks and flood a colliery and the adjacent country. The canal company to prevent this opened a sluice which resulted in the flooding of the colliery but saved the canal. They were held not liable to the colliery company. The Court said that even if the act were wrongful, it was *injuria absque damno.* But it would seem on principle not even to have been wrongful.

THE THEORETICAL BASIS

It is time to turn to the theoretical question: What is the basis of the defence of necessity? Bacon thought that an act done under necessity was not voluntary; but we no longer hold that opinion. An act dictated by necessity is still an exercise of the will, as Hobbes pointed out: 'There is nothing there involuntary, but the hardness of the choice'.[42] Strictly speaking there is perhaps no such thing as necessity, in the context in which lawyers speak of it.[43] A particular act is never necessary, in the sense that there is literally no option,[44] even though the only alternative is one's own death. One is reminded of the Comte d'Argenson's reply to the Abbé who had excused himself for writing scurrilous attacks, on the ground that 'he must live'—'I do not see the necessity'.[45]

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[39] *Gerrard* v. *Crowe* [1921] A.C. 395.

[40] *Greyvensteyn* v. *Hattingh* [1911] A.C. 355.

[41] (1879) 49 L.J.Q.B. 851; 43 L.T. 435; 45 J.P. 21.

[42] Hobbes, *Elements of Law* (1650), c. 12.

[43] Some meanings of 'necessity': (a) Strong probability—'he must have done it'. (b) Logical necessity—'it must follow'. (c) Moral necessity —'I must be good'. (d) Hypothetical or teleological necessity—'You must drink this to get well'. Legal necessity can be regarded as a species of the last.

[44] If the movement is physically compelled, there is no 'act' for legal purposes.

What it comes to is this, that the defence of necessity involves a choice of the lesser evil. It requires a judgment of value, an adjudication between competing 'goods' and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.

If this is so, is there any legal basis for the defence? The law itself enshrines values, and the judge is sworn to uphold the law. By what right can the judge declare some value, not expressed in the law, to be superior to the law? How, in particular, can he do this in the face of the words of a statute? Does not the defence of necessity wear the appearance of an appeal to the judge against the law?

This difficulty is only apparent. 'The law' is not a body of systematised rules enacted as a whole and fixed for all time. Judges have always exercised the power of developing the law, and this is now recognised to be a proper part of their function. 'The law', in a word, *includes* the doctrine of necessity; the defence of necessity is an implied exception to particular rules of law. Even a criminal statute that makes no mention of the doctrine can be regarded as impliedly subject to it, just as such a statute is impliedly subject to the defence of infancy or insanity or self-defence.

The doubts cast upon the doctrine of necessity come from those who fear its abuse; and abused it certainly has been, as in the terrible case of *Gregson* v. *Gilbert* (1783),[46] where 150 slaves were pushed overboard because water was running short. It was under the plea of State necessity that the Star Chamber used the rack to extract information not only from the accused but even from witnesses. Yet it is ancient wisdom that the abuse of a rule does not take away its uses—*abusus non tollit usus.* 'Sir', said Johnson, 'you must not neglect doing a thing immediately good, from fear of remote evil; —from fear of its being abused. A man who has candles may sit up late, which he would not do if he had not candles; but nobody will deny that the art of making candles, by which light is continued to us beyond the time that the sun gives us light, is a valuable art, and ought to be preserved'.

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[45] Voltaire, Preliminary Discourse to *Alzire*, c. 1736 (*Œuvres*, iii, 381). Rousseau has the story in *Émile*. '"My lord, I must live", said an unfortunate satirical author to a minister who reproached him with the infamy of his calling. "I do not see the necessity", replied the man of office coldly. This reply, excellent for a minister, would have been barbarous and false in every other mouth. It is necessary that a man should live'.

[46] 3 Dougl. 232. This was an action on an insurance policy in respect of the loss of the slaves; a new trial was ordered to decide whether the act was in fact necessary. In consequence of the case, statutes were passed forbidding recovery under insurance policies where slaves were thrown overboard.

Some fear the effect that an argument of State necessity may have upon private rights and individual liberty. 'Necessity', declared Pitt, 'is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves'.[47] Then there is the moral attitude expressed in Cicero's words that it is better to receive than to inflict an injury (*accipere quam facere injuriam praestet*), and also the moral question whether the end can justify the means. On the latter question, posed in this general form, there is no agreement, and probably never will be. For our purposes it is perhaps enough to contrast two judicial statements. First, Coke: 'The law of God saith, *Non facias malum, ut inde fiat bonum'*[48]—thou shalt not do evil, that good may come thereof. On the other hand Wilmot, L.C.J., asserted roundly that 'the end directs and sanctifies the means'[49]; and Bentham in effect agreed. Bentham's qualifications do not essentially affect his acceptance of the maxim. 'The end justifies the means. Yes: but on three conditions, any of which failing, no such justification has place.

(1) One is, that the end be good.

(2) That the means chosen be either purely good, or if evil, having less evil in them than on a balance there is of real good in the end.

(3) That they have more of good in them, or less of evil, as the case may be, than any others, by the employment of which the end might have been attained'.[50]

Many will think that, even with these conditions, some means are ethically barred irrespective of ends. The opposite doctrine that ends can justify means—that lying, trickery and torture are all right so long as you do them from a good motive—is now commonly regarded as being characteristic of Communism and Totalitarianism. There are ethical differences between Communist and free societies, but I do not think they can be stated so simply as this. In England we hang and incarcerate criminals, and such punishments can be justified only by reference to their purpose. The collective punishment of villages in Malaya and Kenya is said to be justified by necessity.[51] Those who deny that the end can ever justify the means almost invariably provide themselves with an escape for cases of difficulty by verbal devices. Cicero's attitude is typical: he declares that what is morally right must never be sacrificed to expediency, but that there are many things that in and of themselves seem morally right, but that in certain circumstances and with a change of expediency prove to be not morally right.[52] Thus the apparent evil turns out to be not evil at all.

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[47] Speech in the House of Commons, November 18, 1783.

[48] 5 Co.Rep. 30b; 11 ibid., 74a. Cf. Cockburn, C.J., in *R.* v. *Hicklin* (1868) L.R. 3 Q.B., at pp. 371–372.

[49] *Collins* v. *Blantern* (1767) 2 Wils. K.B., at p. 351.

[50] Bentham, *Book of Fallacies* (1824) Chap. 13.

In reality the difference between the two views seems to be one of emphasis. Most of us think that the moral values we cherish are, in the long run, more important for society and for human welfare than any gain that may seem immediately to accrue from disregarding them. This attitude does not altogether exclude a saving for necessity.

Bacon attempted to restrict the doctrine of necessity by saying that it was an excuse only for invading private rights, not where the act was against the commonwealth. Necessity privileges *quoad iura privata*, but *necessitas publica maior est quam privata*. The examples given by Bacon clarify his meaning. You may throw cargo overboard in a storm to lighten the vessel, but not if the cargo consists of ordnance and munitions which you have been commanded to take to relieve a besieged town. You may pull down a house to stop a fire spreading, but you may not, if attacked in a house, set fire to it as the only way of saving your life. In the latter case, if the fire that you start spreads to a neighbour's house, you are liable to him in damages. Bacon concocted this somewhat fanciful illustration to help his point; there is no judicial authority on it. Bacon went on to say that a man may commit a mere trespass to save his own life; a trespass is not a thing against the commonwealth, as setting fire to houses is. It is clear from this example that what is involved is an assessment of values; the infliction of an evil is justifiable if it is the lesser of two alternative evils. One can understand that in the days of wooden houses, thatched roofs and narrow streets, starting a fire might be a social evil much greater than the loss of an individual life. It would not necessarily be so today. It is somewhat misleading to frame the rule in terms of acts 'against the commonwealth'; in a sense, every tort is against the commonwealth. Certainly every crime is against the commonwealth, and is not merely an infringement of *iura privata;* yet necessity is a defence to a charge of crime. Bacon himself recognised that felons can lawfully break out of a jail which catches fire; but prison-breach is normally a crime.

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[51] I do not speak of war-time, because it would be most unfortunate if what occurs in war were taken as a precedent for a state of peace. 'The whole trend of civilised customs is to mark war off clearly as something special and exceptional. . . . The more clearly the state of war is marked off from the state of peace the less danger there is of our carrying over the habits and standards of conduct from one to the other. The institutionalisation of war is the greatest security against this danger': G. C. Field, *Principles and Ideals in Politics*, Hobhouse Memorial Trust Lecture (1948), pp. 23–24.

[52] *De Officiis*, iii, 3, 4, 25 (trans. Miller, 1913, pp. 279, 285, 373).

A second limitation postulated by Bacon was that necessity is no defence where the exigency was caused by the fault of the actor. Bacon's example related to the law of self-defence and manslaughter, and it may be doubted whether his rule had any validity outside this. Even the rule for the particular case of self-defence seems to have changed with the disappearance of the law of chance-medley.[53]

NECESSITY AND PREROGATIVE

A further element of confusion arose in public law. At first sight the doctrine of necessity is somewhat difficult to separate from the prerogative. The difference is that the defence of necessity is open to everybody, while the prerogative relates only to the King. The old books take it as settled law that every one may in time of emergency go upon land to throw up bulwarks against the enemy.[54] If the King chooses to do this, he does so by necessity, not by prerogative, for it is no special prerogative of his. On the other hand there were some politically necessary things that only the King could do; these belonged to his prerogative. Thus he could (and can) erect sea walls and embankments against sea or tide, and enter the land of a subject to do so.[55] It was said that before Magna Carta, c. 21, he could take wood for the repair of his castles.[56] He requisitioned ships, subject to the payment of compensation,[57] and by the prerogative of purveyance similarly requisitioned provisions for his household and armed forces, including even the impressment of labour.[58] Such powers rested upon the prerogative justified by necessity. In the *Case of the King's Prerogative in Saltpetre* (1606),[59] the judges declared that the King had a prerogative to dig for saltpetre, for the necessary defence of the realm, notwithstanding that gunpowder had been invented within time of memory. The opinion, which was an advisory one, was hedged about with various qualifications, and reads more like a piece of legislation than a statement of existing law. The King was required to restore the place afterwards; and in practice compensation was paid.[60]

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[53] *R.* v. *Semini* [1949] 1 K.B. 405.

[54] Y.B. (1468), M. 8 E. 4, 23a, pl. 41 (where no decision is reported); Y.B. (1506), T. 21 H. 7, 27b, pl. 5; *Case of Saltpetre,* below; *Cambridge Legal Essays* (1926), p. 286. But an express statute was used for this purpose as early as 1512: L. Scott and A. Hildesley, *The Case of Requisition* (1920), pp. 12 n., 18, 220.

This doctrine of State necessity was brought into bad odour by the excesses of Charles I. Trying to govern without Parliament, Charles justified the exaction of ship-money on the ground of public necessity. Now if it were assumed as a premise that Parliament was not there to grant money, the exaction was necessary, and might reasonably have been regarded as lawful. The weakness in the King's case was that he was deliberately refraining from summoning the constitutional organ for taxation. The necessity was therefore a self-induced necessity, which in law is not one at all. Although Hampden lost, when he challenged the tax,[61] it is the subsequent reversal of the decision by a special statute of 1640[62] that is taken to settle the legal principle.

[55] *Greenwich Board* v. *Maudsley* (1870) L.R. 5 Q.B., at p. 401; *Att.-Gen.* v. *Tomline* (1880) 14 Ch.D. 58; *West Norfolk Farmers Co.* v. *Archdale* (1886) 16 Q.B.D. 754.

[56] Plowd. 322.

[57] Holdsworth in 35 *Law Quarterly Review*, p. 12.

[58] Scott and Hildesley, *op. cit.*, pp. 50 *et seq.*, 56. Purveyance was abolished by an Act of 1660.

[59] 12 Co.Rep. 12.

[60] Scott and Hildesley, *op. cit.*, p. 55 *et seq.*

[61] (1637) 3 How.St.Tr. 826.

[62] 16 Car. 1, c. 14.

Since the Revolution the law may be stated as follows. The King cannot acquire new prerogatives by reference to State necessity. The *Case of Saltpetre,* though not overruled, is based upon an obsolete political philosophy. However necessary the behaviour, the Government must today invoke the aid of Parliament if the behaviour involves breaking the letter of the law. It can act under the doctrine of necessity only to the same extent as a private person. Parliament's alleged failure to give adequate powers cannot be an excuse for conduct, because the necessity of the powers claimed is for Parliament to decide, not for the judges over the head of Parliament. The question is not whether it is necessary to do the act but whether it is necessary to do it without the sanction of Parliament.

Paradoxically, this seems to give necessity less scope in public than in private law. The doctrine is a dispensing power exercised by the judges when Parliament cannot reasonably be expected to act.[63] Since Parliament generally can act in great national emergencies, the doctrine is less applicable to these than it is to the minor troubles of individuals.

This does not altogether exclude necessity in public affairs. At one time the Parliamentarians might have wished to confine it in this way, for they were impressed more by the danger of the notion than by its utility. Milton called necessity 'the tyrant's plea'[64]; and Selden said: 'There is not anything in the world more abused than this sentence, *Salus populi suprema lex esto*'.[65] Cromwell declared: 'Necessity hath no law. Feigned necessities, imaginary necessities, . . . are the greatest cozinage that men can put upon the Providence of God, and make pretences to break known rules by'.[66] It is this attitude of mind that explains such sweeping judicial utterances as that of Pratt, C.J., in *Entick* v. *Carrington* (1765)[67]: 'With respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions'. Notwithstanding the esteem in which this pronouncement is commonly held, it does not seem to represent the law. Our books do take notice of State necessity in the particular matter of throwing up bulwarks against the enemy, to mention only one. The view of all lawyers who have considered the subject is that the Crown may by necessity use force to quell insurrection or repel invasion; and this is about all that a so-called declaration of martial law within the realm amounts to.[68] It is also clear from *Humphrey* v. *O'Connor* (1864)[69] that a constable may commit what would otherwise be an assault upon an innocent person if that is the only way of preserving the peace.

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[63] That is to say, act *ad hoc* by the grant of special powers. The doctrine is not excluded by the fact that Parliament has failed to provide for the situation by a *general* change in or clarification of the law, for by hypothesis Parliament has so failed wherever the argument of necessity has to be raised.

[64] *Paradise Lost,* Book 4, line 393. Yet cf. *Samson Agonistes,* 1, 865:

'That grounded maxim
So rife and celebrated in the mouths
Of wisest men, that to the public good
Private respects must yield'.

The reference is presumably to the maxim *Lex vult potius privatum incommodum quam publicum malum.* See *Co.Lit.* 1, 152b; *Wedderburn's Case* (1746), Foster, at p. 29. It was under this maxim that Foster, J., upheld the press gangs: *R.* v. *Broadfoot* (1743) 18 How.St.Tr., at p. 1330.

[65] *Table Talk,* tit. People.

A more difficult case of State necessity was presented in *R.* v. *Stratton* (1779).[70] The Governor of Madras acted illegally and unconstitutionally in refusing to count the votes of some of the members of his Council. Councillors accordingly imprisoned him for eight months and carried on the government themselves. Upon being indicted in England they set up the defence of necessity. Lord Mansfield directed the jury that the defence was one of 'civil or state necessity'. He remarked:—

> 'In India you may suppose a possible case, but in that case, it must be imminent, extreme necessity; there must be no other remedy to apply to for redress; and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves. . . . What immense mischief would have arisen to have waited for the interposition of the council at Bengal?'

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[66] Speech to Parliament, September 12, 1654.

[67] 19 St. Tr. 1030.

[68] Stephen, *History of the Criminal Law* (1883), Vol. 1, p. 207; Pollock, *The Expansion of the Common Law* (1904), pp. 105–106; Keir and Lawson, *Cases in Constitutional Law* (3rd ed., 1948), p. 368 *et seq*.

[69] 17 I.R. 1; cf. *Duncan* v. *Jones* [1936] 1 K.B. 218. Similarly the liberty of the police to search an arrested person for a weapon may be based upon necessity. See also 21 *Columbia Law Review*, p. 71.

[70] 21 St.Tr. 1222.

The jury returned a verdict of guilty. Notwithstanding Lord Mansfield's direction,[71] it may be doubted whether the doctrine of necessity is appropriate to such politically harmful effects as the defendants in that case tried to avoid. In all other cases where the doctrine of necessity has been invoked, the harm sought to be avoided was of an immediate and physical kind. It is submitted that indirect social evils are for the consideration of the legislature, and do not fall within the purview of the doctrine.

COMPENSATION FOR ACTS DONE UNDER NECESSITY

The distinction between ordinary necessity and the prerogative based on necessity is important in respect of compensation. When a person suffers damage as a result of an act done under the ordinary doctrine of necessity, he has no redress. Not only cannot he sue the doer in tort, but he cannot (apparently) sue for compensation as a matter of quasi-contract. Thus if a house be pulled down to prevent the spread of fire, the person so acting is not liable in any form of action. The same is true where it is the Crown that acts under the general doctrine of necessity. But when the Crown does an act that would not be open to the ordinary citizen, and justifies it under the prerogative for reasons of state, it seems that the Crown must pay compensation.[72] However, the prerogative of necessity is now in disuse, because it is covered by and therefore superseded by[73] statutes.

Professor Bohlen[74] points out that the law of necessity is defective on this point of compensation, for 'it is obviously just that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act'. In other words, there should be quasi-contractual liability resting not upon the doer of the act as such but upon the person who benefits from it. That there is no such liability illustrates (1) the imperfection of the law of quasi-contract, and (2) the difficulty that arises when we try to make the law of tort redress unjust enrichment as well as remedy wrongs. At present, if A damages B's property in the necessary defence of his own property, we must either say that A has committed a wrong (when morally and socially he may have done the best thing), or else deny that he is under any obligation to B for the advantage he has gained from the use of B's property. Bohlen refers to the more satisfactory rule in maritime law, whereby if part of the cargo is jettisoned to save the vessel from destruction, the loss is to be divided among the vessel and cargo whose safety is secured thereby.

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[71] And its apparent approval in *R.* v. *Dudley* (1884) 14 Q.B.D., at p. 285.
[72] Scott and Hildesley, *op. cit.*, xxii and *passim*.
[73] *Att.-Gen.* v. *De Keyser's Royal Hotel Co.* [1920] A.C. 508.
[74] 39 *Harvard Law Review*, p. 316. Cf. Prosser, *Torts* (1941), s. 22.

OTHER CONSIDERATIONS AFFECTING THE DEFENCE

We may now consider in more detail some of the factors that control the defence of necessity.

The defence perhaps prevails more readily against a wrongdoer than against an innocent party. Sometimes an inconsiderate motorist will park and lock his car in such a way as to prevent others from being moved. He has only himself to thank if his car window is broken in order to release the brake, and I think that in suitable circumstances necessity would be a defence in any proceedings for the damage.[75] However, there is certainly no rule confining the defence to cases where the complainant is a wrongdoer. Where the complainant is not a wrongdoer he ought in justice to be given quasi-contractual compensation against a person who benefits from the necessary act: but, as just said, English law is defective on this. Suppose that I leave my car parked by the roadside, and on coming back find it tightly sandwiched between two locked cars. The driver that came first after I left is innocent, because it was only the last car that effected the imprisonment of my car. However, I do not know which came last. Needing my car urgently, and having no other way of freeing it, I break the window of one of the two cars. English law seems to say that either my act is justifiable by necessity, in which case I am not liable even if the window I broke happened to belong to an innocent driver, or it is not justifiable, in which case I am liable even to the wrongdoer, subject to a counterclaim for damages if his act in 'imprisoning' my car was an actionable legal (and not merely a moral or social) wrong—which is not certain. It may be thought that I should in justice be liable quasi-contractually to the innocent driver, with a right of indemnity against the driver who was responsible for the whole situation.

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[75] Traffic police carry sets of car keys, so that a telephone call to the police station will usually bring effective assistance. But this fact is not generally known.

(You are telling us!

Necessity cannot be used to set aside the values expressed in the law; it can only qualify and modify them. The reluctance of the bench to invoke the doctrine is well illustrated by a charge that was brought before a London magistrate in 1940, during the air attacks on London. Certain classes of enemy aliens were made subject to a curfew by Government order, and the accused was a German servant girl who left her master's house at night, together with him and his family, in order to go to a shelter during air-raids. This was literally a breach of the curfew order, but it was argued in the girl's defence that she acted only from the motive of self-preservation. The magistrate convicted, but intimated that if the house had actually been set on fire by incendiary bombs, she might lawfully have left it. This admits some exception to the literal words of the law, while drawing the exception as narrowly as is consistent with the minimum of humane feeling. The certainty of death justified a breach of the literal words; but the risk of death did not.

A further complication is the difficulty of foreseeing the effect of conduct, especially the indirect effect. In itself it is a good thing for a fire engine to proceed quickly to the scene of a fire; but what if the extra speed appreciably increases the risk of a traffic accident? The judicial view is that whatever the risk caused by the fire, the immediate duty of the fireman is to proceed with due care for the safety of those using the highway.[76] He must not try to mitigate one peril by creating another which may be of equal or greater magnitude. On the other hand it may be that the doctrine of necessity will in appropriate circumstances exempt the driver of a fire engine from purely technical rules, such as the duty to wait at a crossing for a change of lights when there is clearly no other vehicle approaching the crossing.[77]

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[76] *Ward* v. *L.C.C.* [1938] 2 All E.R. 341 (driver of fire engine guilty of carelessness in not observing traffic lights).

[77] Fire engines, ambulances and police cars are specifically exempted from speed limits by Road Traffic Act, 1934, s. 3. This express provision might tell against common law exemption from other provisions; but on the other hand it may be argued that the doctrine of necessity is narrower than s. 3, because it requires a real case of necessity to be shown.

It is not only the fear of contradicting the law and the difficulty of predicting consequences that impede the admission of the defence. Necessity involves a scale of values, and a judge in adjudicating upon the defence may have to make a decision of the greatest ethical difficulty. For example, where does liberty come in the scale of values? One can lawfully detain a man in some cases, as to prevent a continuation of a breach of the peace. The law on the subject of personal liberty is now so detailed that there will rarely be a case of first impression for decision by reference to necessity. But mention may be made of a case before Holt, C.J., where he appears to have thought that if A finds himself without his own fault in a situation in which he can only escape by trespassing upon the land of B, A is liable in damages to B for this trespass and cannot defend himself by the necessity in which he was placed.[78] This was only an *obiter dictum*, and it seems to accord a strange preference to the right of property over personal liberty.

When, if ever, is the value of life inferior to the value of property? Generally, of course, we regard the value of life as paramount. The master of a vessel may lawfully deviate to succour the distressed; he is not liable for breach of contract in making the deviation.[79] One cannot, generally, kill in defence of one's property. Yet one may perhaps kill to prevent a felony, even though the felony prevented only involves loss of property. And one may kill in defence of the dwelling-house.

These instances show that it is not true without qualification that we regard life as superior to property. The steeplejack willingly risks his life either for the pleasure of his job or for the sake of earning risk money. Coal cannot be won without loss of life; it would be a simple matter to calculate the number of lives that will probably be lost to obtain a given quantity of coal. Individually these deaths are accidental or unintended; but statistically speaking we incur the certainty of them in order to obtain coal. Society will run a risk with the individual which becomes a certainty when a sufficient number are involved.

The most difficult case in this part of the law is where the life of an innocent person is deliberately taken to preserve the life of another. This is the most controversial question in the law of necessity, and space forbids my entering into it.

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[78] *Wright* v. *Wilson* (1699) 1 Ld. Raym. 739; Holt, C.J., said that A could sue the person who brought him into his predicament, apparently to obtain an indemnity against the damages that he would have to pay B.

[79] Maclachlan, *Merchant Shipping* (7th ed., 1932), p. 343.

In adjudicating upon the defence of necessity, the facts must be taken as they appeared to the defendant at the time. Thus where a son believed that his father was about to murder his mother, his killing of his father in supposed defence of his mother was excused.[80] The case may be regarded as being on self-defence, or rather private defence; but that is brother to necessity and the rule is the same for both. The effect is that a defendant may plead a compound of necessity and mistake of fact. Nor, on a criminal charge requiring intention or recklessness, need the mistaken belief be reasonable, for even an unreasonable belief is capable of negativing *mens rea*.[81] In a tort action, on the other hand, the belief must generally be reasonable, for otherwise the defendant will be liable in negligence.[82]

[80] *R.* v. *Rose* (1884) 15 Cox 540.

[81] This is clear on principle and is supported by the ruling of Morris, J., in *R.* v. *Bergmann* (1948); see *supra,* Vol. 5, p. 134. The issue of reasonableness may, however, arise in manslaughter, for here (it seems) negligence is in issue: hence the reference to reasonableness in *R.* v. *Rose,* above.

[82] *Cope* v. *Sharpe* (No. 2) [1912] 1 K.B. 496 (C.A.).

12

THE TORT OF NEGLIGENCE

D. J. Payne

Though the existence of an independent tort of negligence has been generally recognised for the past twenty years, there is still much uncertainty as to the principles, if any, on which liability in the tort of negligence is based. The plaintiff in an action of negligence must, it is now settled, show that on the occasion of which he complains the defendant was under a legal duty to take care not to injure him, that the defendant failed to exercise such care, and that he, the plaintiff, was injured in consequence.[1] Whether or not a given situation gives rise to a legal duty to take care is a question of law: the other issues, subject to the condition that there be sufficient evidence to warrant a finding for the plaintiff, are questions of fact for the jury, if there be one, or, if not, for the trial judge in his fact-finding capacity. As a result of this division of functions, consideration of any general principle of liability in the tort of negligence necessarily takes the form of an inquiry into the principles on which the courts determine, first, whether any duty of care at all arises from a relationship and, secondly, if a duty to take care does arise, what degree of care must be taken.[2]

In general, the courts have been reluctant to enunciate wide statements of principle, and we have the rather surprising authority of Lord Atkin for the proposition that 'to seek a completely logical definition of the general principle [governing the duty to take care] is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or introduce non-essentials'.[3] As a general rule the courts have been content to pronounce upon the degree of care that must be taken in particular situations and relationships. Thus we have special rules relating to the degree of care that must be taken by the occupier of premises towards persons entering those premises and special rules relating to the care that must be taken in handling dangerous chattels and in controlling animals. Before 1932, the only serious attempt by a judge to formulate a statement of the general principle on which a duty to take care arises was that of Brett, M.R. (as he then was) in *Heaven* v. *Pender*,[4] and this was expressly dissented from by his two brethren in the Court of Appeal.[5] Moreover, in a later case, Brett, M.R., himself qualified his earlier dictum in such a way as to deprive it of the greater part of its scope.[6]

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[1] Winfield, *Law of Tort* (5th ed., 1950), p. 405.

[2] The rule that a duty to take care must be proved has been strongly criticised (see Winfield, *op. cit.*, p. 406 and (1934) 34 *Columbia Law Review*, p. 41; Buckland, 51 *Law Quarterly Review*, p. 637), but, as Winfield admits, it has unquestionably been accepted by English law. The rule has lately found a defender in Professor F. H. Lawson (*The Duty of Care in Negligence* (1947) 22 *Tulane L.R.* 111) who contends that the requirement of a legal duty to take care, or something analogous to it, is a necessary feature of any developed law of negligence.

[3] *Donoghue* v. *Stevenson* [1932] A.C. 562, at p. 580.

Until it was finally settled that negligence was an independent tort and not merely a condition of liability in certain defined relationships and situations, little need was felt for a general principle of liability to which could be referred all the diverse situations in which liability for negligence was recognised to exist.[7] Novel situations of fact, not covered by previous authority, did, it is true, arise from time to time, but these situations were disposed of either by denying as a matter of law that any duty to take care arose[8] or, if the Court was in favour of liability for negligence, by leaving to the jury the question whether the defendant had exercised such care as would have been taken by a reasonable man in the circumstances. In the more common relations the standard of the duty of care was settled by the judges as a matter of law, and the function of the jury was confined to deciding whether a defendant has exercised the degree of care required of him by the law, as expounded by the judge.[9] But in a novel relation, it was generally thought that, so long as the judge would allow of there being any duty to take care at all, the standard of care that must be taken was that which a jury thought reasonable in the circumstances.[10]

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[4] (1883) 11 Q.B.D. 503, at p. 509.

[5] Cotton and Bowen, L.JJ.

[6] In the earlier case he said that 'whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger': 11 Q.B.D., at p. 510. In *Le Lievre* v. *Gould* (1893) 1 Q.B. 491, at p. 504, however, he declared that *Heaven* v. *Pender* had merely decided that 'if one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property'.

[7] Thus, Thomas Beven, in the two large volumes of his *Negligence in Law* (4th ed., 1928), expressed no general principle of liability in negligence. His famous work is a catalogue of the situations in which negligence gives rise to liability.

[8] As in *Le Lievre* v. *Gould* (1893) 1 Q.B. 503.

Once it was recognised that negligence was an independent tort, not confined to defined situations and relationships but general in its application, it was inevitable a general principle would be sought. In *Donoghue* v. *Stevenson,*[11] the case which established the existence of negligence as a tort, a principle was propounded by Lord Atkin which, despite occasional dissenting voices, has won general approval from both judges and writers.[12] There must be, thought Lord Atkin, in English law 'some general conception of the relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist'.[13] Such a common element was, he thought, to be found in the rule that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour', 'neighbours' being those persons 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[14] Though neither Lord Thankerton nor Lord Macmillan, the other members of the majority of the House in *Donoghue* v. *Stevenson,* associated himself with this obiter dictum of Lord Atkin,[15] and though it was almost immediately doubted by Scrutton, L.J.,[16] many judges have cited it since as an authoritative statement of general principle in the tort of negligence. Sir Percy Winfield accepts it in his *Textbook of the Law of Tort* as the *locus classicus* on the question of duty,[17] and the late Dr. Stallybrass accepted that if one sought a general principle governing new situations in the tort of negligence one could find it only in Lord Atkin's dictum.[18] Dr. Charlesworth, too, appears to accept it without question.[19]

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[9] *E.g.*, the relations of occupier/invitee, occupier/licensee and occupier/trespasser.

[10] Cf. Holmes, *The Common Law,* p. 123; Beven, *op. cit.*, p. 13; Pollock, *Torts* (13th ed., 1929), p. 27.

[11] [1932] A.C. 562.

[12] Bucknill, L.J., referred to it in *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, at p. 307, as 'the classic statement', and Evershed, M.R., in *Denny* v. *Supplies & Transport Co., Ltd.* [1950] 2 K.B., at p. 377, spoke of 'the principles which found classic expression in the speech of Lord Atkin'.

[13] [1932] A.C. 562, at p. 580.

[14] *Ibid.*

[15] Lord Macmillan did, however, at one point in his judgment, say that though its universality might require some qualification, he was prepared to accept Brett, M.R.'s dictum in *Heaven* v. *Pender* as a sound guide: see [1932] A.C. 562, at p. 614.

The most forceful dissenting voice is that of the editor of Pollock's *Torts*, Mr. P. A. Landon.[20] He points out that there are many cases,[21] some of them decisions of the House of Lords, inconsistent with the general principle stated by Lord Atkin, the authority of which has not and, often, could not be affected by 'the *ipse dixit* of a single Lord of Appeal'.[22] In his view, though Lord Atkin's statement of principle has often been approved by lower courts, the House of Lords has not yet committed itself. 'The House of Lords must one day', he declares, 'either reject the Atkin doctrine as an accurate criterion or tell us how it can be reconciled with the accepted rules'.[23] His own opinion is that 'the existence of the duty to take care cannot be referred to any general principle of liability, but that it must be determined by the courts, as a matter of law on the facts of each case'.[24]

Though I agree with much of Mr. Landon's criticism of Lord Atkin's foresight rule and shall, indeed, in this paper suggest an alternative to it, I cannot agree with the learned writer's view that the House of Lords has remained non-committal on the subject. In *Bourhill* v. *Young*,[25] for instance, three of their Lordships expressly approved of Lord Atkin's test.[26] And in *Bolton* v. *Stone*[27] (decided since Mr. Landon wrote) three members of the House again quoted Lord Atkin's dictum as an authoritative statement of principle in the law of negligence.[28] It is true that the House has probably not put it out of its power to qualify the rule should the occasion arise, since the rule is so general that its formulation can always be held to beyond the *ratio* of a decision, but, so far as such a general principle can be approved, there is little doubt that the House of Lords has approved it.

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[16] *Farr* v. *Butters* [1932] 2 K.B. 606, at p. 613 *et seq.*
[17] Winfield, *op. cit.*, p. 406.
[18] Salmond, *Law of Tort* (10th ed., 1945), p. 434.
[19] Charlesworth, *The Law of Negligence* (2nd ed., 1947), p. 13 *et seq.*
[20] Pollock, *Torts* (15th ed., 1951), Excursus D, at p. 327. Mr. Landon claims that 'the view has been gathering force that [the Atkin test] cannot be regarded as authoritative'. But he does not tell us who, apart from himself, holds such a view.
[21] *Bradford* v. *Pickles* [1895] A.C. 587; *Derry* v. *Peek* (1889) 14 App.Cas. 337; *Le Lievre* v. *Gould* [1893] 1 Q.B. 503; *Allen* v. *Flood* [1898] A.C. 1; *Jacobs* v. *L.C.C.* [1950] A.C. 361; *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.
[22] Pollock, *op. cit.*, p. 333.
[23] *Ibid.*
[24] *Ibid.*, p. 328.
[25] [1943] A.C. 92.

One must, said Lord Atkin, take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure one's neighbour. One must, that is to say, take reasonable care to prevent reasonably foreseeable injury to others. It is implied by the rule that unless injury to others is reasonably foreseeable no duty to take care arises, and so it was held by the House of Lords in *Bourhill* v. *Young*.[29] Where no injury to any person is at the time foreseeable, few will question the rule that it is not negligent to fail to guard against injury. Yet so long as our law adheres to the doctrine that a wrongdoer must take his victim as he finds him, with the consequence that the injuries for which he may be liable may greatly exceed anything he might have foreseen, the particular refinement of the rule evolved by the House in *Bourhill* v. *Young*, that injury to the *plaintiff* himself must be foreseeable before a duty arises towards *him*, must appear somewhat of an anomaly.

The positive aspect of the neighbour rule, and that which Mr. Landon criticises is, of course, that whenever injury to another *is* reasonably foreseeable one is under a legal duty to take reasonable care to avoid acts or omissions likely to cause that injury. Mr. Landon cites a string of cases,[30] most of them decisions of the House of Lords, inconsistent with any such general rule, if we give that rule its ordinary meaning. Even if we limit the scope of the rule to liability in negligence for injuries to the person or to property, excluding from its ambit cases of pecuniary damage, as was recently done by the Court of Appeal,[31] it is still difficult to reconcile many of the cases with it. How are we to reconcile with the neighbour principle such well-established rules as that the duty of an occupier of premises towards a licensee is merely to warn him of traps actually known to the occupier,[32] that towards a trespasser the occupier owes in general no duty at all,[33] that the donor or gratuitous lender of a dangerous chattel need only give warning of defects actually known to him,[34] and that in an action for malicious prosecution the plaintiff must prove not merely that the defendant acted without reasonable and probable cause but also that he acted maliciously?[35]

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[26] Lord Russell of Killowen, at p. 101, Lord Porter at p. 116, and Lord Wright at p. 107. See also Lord Wright in *Glasgow Corp.* v. *Muir* [1943] A.C. 448, at p. 460.

[27] [1951] A.C. 850.

[28] Lord Porter at p. 858, Lord Normand at p. 861, and Lord Reid at p. 865.

[29] [1943] A.C. 92.

[30] See note 21, *supra*.

The most likely answer to these objections would perhaps be that in the various situations instanced the courts have settled as a matter of law what standard of care is reasonable in the circumstances, even though the standard of care that is reasonable is, exceptionally, no care at all.[36] But if 'reasonable care', for the purpose of the 'neighbour' rule, means no more than that degree of care which the judges, in the circumstances of each particular relationship, consider appropriate, then the neighbour rule in truth embodies no principle at all. Rather than incant the formula that one must take reasonable care to prevent foreseeable injury, we should be better employed in attempting to discern the considerations which weigh with the courts in determining the standard of care appropriate to a particular relationship. If any general statements can be made regarding these considerations, they are likely to furnish more valuable guides to the outcome of actions of negligence than the neighbour rule. I believe that an analysis of the cases, before and since 1932, does in fact warrant certain generalisations, and the remainder of this paper will be devoted to enumerating and discussing what seem to me the more important of these.

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[31] *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, at pp. 189 and 196. In *Old Gate Estates Ltd.* v. *Toplis* [1939] 3 All E.R. 209, Wrottesley, J., thought that Lord Atkin's neighbour principle was confined to injuries to the person. Asquith, L.J., in *Candler's Case* (at p. 189) thought this view too narrow.

[32] *Jacobs* v. *L.C.C.* [1950] A.C. 361.

[33] *Addie & Sons Ltd.* v. *Dumbreck* [1929] A.C. 358.

[34] *Coughlin* v. *Gillison* [1899] 1 Q.B. 145. This rule was expressly approved by Lord Atkin in *Oliver* v. *Saddler* [1929] A.C. 584.

[35] Winfield, *op. cit.*, p. 628 *et seq.*

[36] Thus, in *Glasgow Corp.* v. *Muir* [1943] A.C. 448, at p. 461, Lord Wright said that the rule in *Indermaur* v. *Dames* (1866) L.R. 2 C.P. 311 was no more than 'a special sub-head of the general doctrine of negligence'. Cf. *Jacobs* v. *L.C.C.* [1950] A.C. 361, at p. 368.

I. ACTS AND OMISSIONS

In the first place one must distinguish between acts and omissions. Whatever may be the case in morals, in law a duty is rarely cast upon a person to take positive action to avoid injury to another. As Pollock remarked,[37] 'the law does not and cannot undertake to make men render active service to their neighbours at all times when a brave man would do so. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act'. This absence of liability for failure to take positive action cannot be explained as resting upon any distinction in the eyes of reasonable men between conduct that is reasonable and that which is not, for the reasonable man does not stand by and watch a child drown in three feet of water, and yet, provided he does not stand *in loci parentis* to the child, he incurs no liability in law should he do so. That one is not in general liable for failing to take positive action to prevent injury to another has in fact been recognised by the House of Lords since *Donoghue* v. *Stevenson* was decided. In *East Suffolk Rivers Catchment Board* v. *Kent*[38] the respondent's farm was flooded with sea water when a sea wall on a tidal river within the area of the appellant Catchment Board was breached by a high tide. The Board had statutory power to repair sea walls, but was under no statutory duty to do so. In exercise of its powers the Board undertook the repair of the breached wall, but did the work so inefficiently that the breach was not repaired until more than five months later; though it was proved at the trial that with reasonable skill it could have been done within fourteen days. The House of Lords held that the Board was not liable in negligence to the respondent. Not only was the Board under no duty to undertake the repair of the wall at all, but, having undertaken the task, its only duty was not to add to the damage that would have been done had it done nothing. Both these propositions conflict with the neighbour rule, and it is significant that Lord Atkin, though agreeing that the Board was under no duty to undertake the repair of the wall, dissented from the view of the majority of the House in holding that, once the task was undertaken, the Board was under a duty to act with diligence and was liable in negligence for failing to do so. Such a duty was, he thought, to be inferred from the principles accepted by the majority in *Donoghue* v. *Stevenson.*[39]

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[37] *Torts* (15th ed., 1951), p. 333.

[38] [1941] A.C. 74.

The situations in which a positive duty to act is cast upon a person are so rare that it would seem preferable to catalogue those situations rather than attempt to formulate any single principle embracing liability in negligence for both act and omission.

2. ELEMENT OF ADVANTAGE

In developing many of the rules relating to the standard of care that must be taken in different situations, the courts have often had regard to any element of advantage to the defendant from the relationship in question. The commonest relation in which such advantage is present is, of course, where there is a contract between the parties. The high standard of care, often amounting to a warranty of fitness, demanded in such circumstances, though resting in the theory of the law on implied contractual terms, is in fact founded on considerations of public policy, just as are duties of care in the law of tort. The rule in *Francis* v. *Cockrell,*[40] for instance, is just as much founded on public policy as the rule in *Indermaur* v. *Dames,*[41] the only difference being that the former, resting on an implied contractual term, may be excluded by an express term of the contract in question. Even where there is no contract, the law, in determining what standard of care must be taken by the occupier of premises to prevent injury to persons entering, distinguishes between invitees and licensees, the former being persons in whose presence the occupier has a business or material interest, the latter, persons in whose presence he has no such interest.

A similar distinction is made with regard to liability for dangerous chattels[42] and in regard to the liability of a bailee for loss of or damage to the goods bailed.[43] The relevance of the element of advantage in determining standards of care is, too, supported by the sentiments of the average man, so often invoked in this connection. If I license a neighbour to make use of my garden, it is most unlikely that he expects of me the degree of care for his safety that he does from a shopkeeper whose shop he enters. All the instances I have cited, in which the element of advantage is held a material factor, seem to be based on a general, wholesome sentiment that one who confers a favour on another should be liable only for gross negligence towards that other.[44]

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[39] *Ibid.*, at p. 92.
[40] (1870) L.R. 5 Q.B. 501.
[41] (1866) L.R. 2 C.P. 311.
[42] Winfield, *op. cit.*, p. 547.

Now that negligence is an independent tort, there is no reason to suppose that the element of advantage is not still a material consideration in determining standards of care. The House of Lords has recently held that a licensee who suffers injury on premises is entitled only to so much care on the part of the occupier as is required of him by the authorities on dangerous structures, and cannot improve his remedy by casting his action in negligence.[45] The House would not reopen the question what was reasonable care in the circumstances: the cases turned, it was held, 'wholly on the category into which the appellant is to be placed',[46] either invitee or licensee. The absence of any element of advantage to the respondent will, perhaps, some day be put forward as the true explanation of the much-criticised decision of the Court of Appeal in *Ball* v. *L.C.C.*[47] The respondent in that case, the L.C.C., gratuitously installed in the house of one of its tenants an Ideal boiler which had no safety valve. During a spell of cold weather the water in the boiler froze, with the result that when the tenant's daughter lit a fire in it, the boiler exploded, seriously injuring her. The Council did not know that the boiler was defective. Stable, J., nevertheless held that the Council had been negligent and gave judgment for the daughter.[48] His judgment was reversed by the Court of Appeal. The Court accepted the trial judge's finding of negligence, but held that the Council could only be liable to the plaintiff if the boiler fell into the category of things dangerous *per se;* which, the Court, held, it did not.

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[43] *Coggs* v. *Bernard* (1703) 2 Ld. Raymond 909; *Martin* v. *L.C.C.* [1947] 1 K.B. 628.

[44] It is interesting to note that Professor Bohlen, writing in 1905, concluded from a review of the English authorities at that time that a duty to take affirmative precautions to secure the safety of others was imposed only on those who had voluntarily assumed a position or relation from which a benefit was derived by them; see *The Basis of Affirmative Obligations in the Law of Tort* in his *Studies in the Law of Torts,* at p. 33.

[45] *Jacobs* v. *L.C.C.* [1950] A.C. 361.

[46] *Ibid.,* at p. 368.

[47] [1949] 2 K.B. 159. See the criticism of Dr. Goodhart in 65 *Law Quarterly Review,* p. 518.

The Court of Appeal's decision has been criticised as retrograde in that it reverts to the pre-1932 condition of things, in which negligence gave rise to liability only in particular situations, and also on the ground that, in insisting on the importance of the distinction between things dangerous *per se* and things not so dangerous, the Court resurrected a distinction that has lost most, if not all, of its importance since *Donoghue* v. *Stevenson.* And on its reasoning, indeed, it is impossible to reconcile the decision with many of the cases which have professed to follow the House of Lords' decision.[49] On its facts, however, it can be explained, and will, it is hoped, some day be interpreted, as merely an illustration of the well-established rule that the duty of a gratuitous giver or lender of chattels is simply to warn the transferee of any dangerous defect in them actually known to the giver or lender. Such a rule is, as we have suggested, not manifestly unfair.[50]

It is interesting to note, while on this subject, that the rule which makes a master liable for the tort of his servant, a rule of undoubted strict liability, has often been explained as being based on the consideration that the master profits from his servant's employment. In the United States the acceptance of this explanation has led to the corollary, in one State at least, that if the master in fact derives no profit from the employment of the servant, he is not liable for the servant's torts.[51] On this reasoning, charitable institutions, such as hospitals, have been exempted from the ordinary rule of master and servant liability.[52] The same unwillingness to hold voluntary hospitals liable for the torts of their professional servants can be found in the English cases up to the coming into force of the National Health Act, 1946,[53] though in this country the device used to achieve this result was a spurious distinction between servants and independent contractors, which has since been discarded.[54]

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[48] [1948] 2 All E.R. 917.

[49] See Winfield, *op. cit.*, p. 554, note (g).

[50] Mr. Marsh, in 66 *Law Quarterly Review,* p. 39, contends that, since *Donoghue* v. *Stevenson,* there is no such rule, but the weight of the authorities is against him. The House of Lords has recently upheld the analogous rule in dangerous structures, in *Jacobs* v. *L.C.C.* [1950] A.C. 361, and the two rules are usually regarded as being founded on the same principle: see *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 371.

[51] See Bohlen, *op. cit.*, p. 65.

[52] *Hearns* v. *Waterbury Hospital,* 66 Conn. 98, 33 Atl. 595; *McDonald* v. *Hospital,* 120 Mass. 332.

3. LIKELIHOOD OF INJURY

The standard of care appropriate to a situation depends, among other considerations, on the likelihood of injury occurring, and also on the relative severity of the injury which is threatened. It would hardly be necessary to affirm such elementary propositions were it not that the House of Lords had recently to reverse the Court of Appeal in affirming the relevance of the latter consideration.[55]

Some curious dicta on the relevance of the likelihood of injury to the existence of a duty of care are to be found in the recent case of *Bolton* v. *Stone*.[56] The plaintiff, while standing in the highway outside her house, was struck on the head by a cricket ball hit out of an adjoining cricket ground, managed by the defendants, the committee of a cricket club. She sued the defendants in negligence. At the trial it was proved that, to the knowledge of the defendants, balls had in the past on very rare occasions fallen into the highway. Oliver, J., held that the ground was, in the circumstances, 'quite large enough for all practical purposes of safety' and dismissed the plaintiff's claim.[57] The Court of Appeal reversed his judgment on the ground that the doctrine of *res ipsa loquitur* applied so as to throw on the defendants the onus of showing that they had taken reasonable care for the plaintiff's safety, which, so the Court held, on the facts, they had not shown.[58] The House of Lords, in its turn, reversed the decision of the Court of Appeal and restored the judgment of Oliver, J. Since the facts of the case were fully known, the doctrine of *res ipsa loquitur*, it was held, had no application. The sole question at issue was whether the facts proved constituted negligence on the part of the defendants, and the House unanimously agreed with Oliver, J., that they did not.

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[53] *E.g.*, *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 820. Referring to the general opinion that hospitals were not liable for the torts of their professional servants, Denning, L.J., in *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343, at p. 361, said: 'I cannot help thinking that this error . . . was due to a desire to relieve the charitable hospitals from liabilities which they could not afford'.

[54] *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343.

[55] *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42.

[56] [1951] A.C. 850.

[57] [1949] 1 All E.R. 237, at p. 238.

[58] [1949] 2 All E.R. 851.

How was this conclusion to be reconciled with Lord Atkin's neighbour rule; for the committee of the club admitted to having taken no steps to guard the plaintiff from injury? How were the defendants to be justified in taking no steps to prevent injury the possibility of which they must without question have foreseen? Lord Porter, Lord Normand and Lord Reid found the explanation in a distinction between injuries which were probable and those which were merely possible.[59] Lord Atkin had, they emphasised, in his famous dictum, spoken of a duty to avoid acts or omissions 'which you can reasonably foresee would be *likely* to injure your neighbour'.[60] 'It is', said Lord Normand, '. . . not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the *possibility* that a ball might be hit out of the ground by a batsman and might injure people on the road. She must go further and say, that they ought, as reasonable men, to have foreseen the *probability* of such an occurrence'.[61] Without such probability, no duty to take care arose.

With all respect to their Lordships, this reasoning cannot be accepted as generally valid in the law of negligence. It is simply not true that there must, in every case, be a foreseeable probability of injury before any duty to take care arises. Reasonable foresight is material in questions of negligence because the reasonable man adjusts his conduct to what he can foresee. In certain situations it may be that the reasonable man does not feel called on to guard against remote possibilities which he can foresee, and the law may confirm him in this view; but this is far from saying that remote, though foreseeable, possibilities are never relevant to the standard of care that must be taken. An important consideration will be the comparative ease with which any remote possibility of injury can be avoided by the person who foresees it. If that remote possibility could be avoided at no inconvenience to the person who foresees it, he would almost certainly be held negligent in failing to avoid it. The chances

[59] [1951] A.C. 850, at pp. 858, 861 and 865.
[60] [1932] A.C. 562, at p. 580. Italics supplied.
[61] [1951] A.C. 851, at p. 861.

of injuring any one in throwing a brick out of a window into the highway in a sparsely populated region may be statistically less than they were in *Bolton* v. *Stone*, but since that remote possibility of injury can be avoided by the simple precaution of ensuring that there is no one in the road at the time, the thrower, if he were in fact to strike any one, would almost certainly be held guilty of negligence.

It is submitted that the more satisfactory method of disposing of the issue in *Bolton* v. *Stone* is that which was adopted by Lord Radcliffe. In his view a breach of duty had taken place if the plaintiff could show that the defendants had failed to take reasonable care to prevent the accident. But, he said, 'unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty, and here, I think, the respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called on either to abandon the use of the ground for cricket or to increase the height of the surrounding fences. He would have done what the appellants did. In other words, he would have done nothing'.[62] Lord Radcliffe's view appears to be, not that the mere possibility of injury is never sufficient to give rise to a duty to take care, but that in certain circumstances, such as in *Bolton* v. *Stone*, it may be reasonable to take no steps to prevent a foreseeable injury to another. This is, it is submitted, the correct view.

The fact that three members of the House in *Bolton* v. *Stone* were led to formulate such an unnatural distinction as that between possibility and probability in order to reconcile the conclusion they came to with Lord Atkin's neighbour principle is, I suggest, cogent evidence of the unsatisfactory character of the rule. The rule requires one to take reasonable care to prevent foreseeable injury. Given its ordinary meaning, it leads one to suppose, as their Lordships appear to have assumed in *Bolton* v. *Stone*, that once the possibility of injury happening is admitted as relevant to the existence of a duty to take care, then a duty to take *some* steps to prevent that injury must inevitably arise.

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[62] *Ibid.*, at pp. 868–869.

This, however, is not necessarily so, as the decision shows. As Lord Radcliffe pointed out, even if one accepts the remote possibility of injury as a material consideration, it may yet be reasonable to do nothing.

4. RELATIVE VALUE OF CONFLICTING INTERESTS

A further consideration in determining the degree of care appropriate to a particular situation is the relative values of the interests of the plaintiff and defendant which have come in conflict. The more valuable, in the eyes of the law, the interest of the plaintiff which the defendant endangers, the more care must the defendant take; while, conversely, the more worthwhile the interest that the defendant is pursuing, the less care will he be required to take for the safety of others. A century ago it would almost certainly have been negligent to propel a heavy vehicle along the highway at a speed of thirty miles an hour, thereby exposing others to some risk of death or serious injury, but nowadays the general public interest in rapid transport is held to justify the driving of vehicles at considerably greater speeds, even though the practice kills thousands annually.

Though the courts rarely advert to the relative values of the conflicting interests in a case, such considerations are always material to a decision and should be borne in mind in studying the cases or attempting to forecast the answer that the courts will give to a particular problem.[63] It is, for instance, difficult to escape the conclusion that it was a material factor in *Bolton* v. *Stone* that the defendants were using their land for the playing of cricket, our national game and one likely to be looked on with favour by the sort of person who is appointed a Lord of Appeal, and that, as some of the judges recognised, the only certain way of preventing injury to members of the public outside the ground was to stop playing cricket altogether. That was, it was held, too much to expect. The judgment reflects, a jurist of the historical school might say, the *volksgeist* of the people. But it by no means follows that the decision would have been the same had the ground been used for some less laudable pursuit, such as the sport of baseball, which exposed the public to the same risk of injury; for in such circumstances the interest of the plaintiff in freedom from personal injury might well outweigh the interest of the defendants in promoting their sport. A considerable number of accidents on the roads are caused by unled dogs, but so dear is that animal to Englishmen that no dog owner has ever been held negligent in allowing a dog to run freely in the streets. But here again it by no means follows that the same immunity would be extended to the owner of an animal less dear to the English heart, even though it might be shown that the animal in question is no more likely to cause an accident than a dog.

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[63] The importance of the comparative value of conflicting interests is recognised by the American *Restatement of the Law of Tort* (Negligence, Vol. 1) in the following paragraphs:

'291. (1) Where an act is one which a reasonable man would recognise as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or the particular manner in which it is done.

'292. In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

(a) The social value which the law attaches to the interest which is to be advanced or protected by the conduct,

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct, and,

(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

'293. In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(2) the social value which the law attaches to the interests which are imperilled . . . '.

If the degree of care that is reasonable depends on a conscious or unconscious valuation of interests, one would expect the law to take account of any motive for acting which makes one's conduct especially meritorious and, therefore, more valuable. And there is some evidence in the cases that this is in fact done. Failure to take care for one's own safety ordinarily has the effect of defeating one's claim, wholly or in part, for injuries suffered through the fault of another, on the ground of *volenti* or contributory negligence, but if one's motive is to save life or property neither of these defences applies.[64] The pressure of necessity, it has been held, may justify the infliction of intentional injury on an innocent person.[65] Even the mere desire to get on with one's business may justify the assumption of risks that would otherwise constitute contributory negligence.[66]

The reasoning underlying these cases suggests that the personal motive of the defendant may be relevant to the standard of care which he should take. If, in driving along the highway I came upon a serious accident and am asked to summon an ambulance, am I not justified in driving a little faster on that errand and in taking a little less care for the safety of others than I must ordinarily? The driver of a fire engine enjoys, it has been held, no special immunity by reason of his mission,[67] but in a more recent case,[68] in which the driver of a left-hand drive ambulance during the Second World War caused an accident through failure to give the ordinary hand signals, the Court of Appeal held that the importance of the end to be served by driving the vehicle was a material factor to be considered in determining what standard of care was reasonable in the circumstances. A jury would certainly take into account the defendant's motive in determining whether he had taken reasonable care: judges, it is submitted, within the wide discretion allowed by the criterion of reasonableness, do likewise, though neither judge nor jury, it need hardly be said, is likely to be conscious that the defendant's motive in acting as he did has had a material bearing on the standard of reasonableness decided on. But it is not any the less material for that reason.

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[64] *Haynes* v. *Harwood* [1935] 1 K.B. 146; *Hyett* v. *G.W. Rly.* [1948] 1 K.B. 345.

[65] *Cope* v. *Sharpe* [1912] 1 K.B. 496.

[66] *Clayards* v. *Dethick* (1848) 12 Q.B. 439.

5. THE ABILITY TO PAY

Finally, there is the ability of a defendant to pay. One should never lose sight of the fact that the fundamental issue in an action of tort is whether the defendant should pay compensation to the plaintiff: all inquiry into the existence of any antecedent duty and breach of such duty is subordinate to that end. The conclusions arrived at by a judge as to the existence of any duty to take care or as to whether there has been any breach of that duty are likely to be conditioned by his opinion whether or not the defendant ought in justice and on grounds of public policy to compensate the plaintiff. The rule that there is no liability for negligent misstatement is an excellent illustration of this tendency.[69] The average, prudent accountant takes care in the preparation of accounts just as the average, prudent surgeon takes care in performing an operation, and if, as has often been said, tortious negligence were in fact constituted by failure to take the care of the average, prudent man, the accountant, just as much as the surgeon, would be liable for failing to take that amount of care. The courts have, however, decided, for reasons of policy, that such persons as accountants are not to be liable for negligent misstatement, chiefly because liability for the possibly calamitous consequences of a negligently false statement would impose too harsh a burden upon professional people. In consequence, we are given the rule that the accountant, except under a contract, is under no duty to take care that his accounts are correct. This rule is arrived at, however, not upon any criterion of what reasonable people do, but in order to give effect to the Court's opinion as to whether the defendant should be made to pay compensation. The fundamental issue in a negligence action is not so much whether the defendant has failed to take the care of a reasonable man in the circumstances, but whether it would be reasonable to compel him, in the circumstances of the case, to pay compensation to the plaintiff.

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[67] *Ward* v. *L.C.C.* [1938] 2 All E.R. 341.

[68] *Daborn* v. *Bath Tramways Motor Co.* [1946] 2 All E.R. 333.

[69] *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

The obligation to pay damages is, from the point of view of the defendant, little distinguishable from the imposition of a fine for a criminal offence. So long, therefore, as a defendant has to draw on his own private resources in order to satisfy a judgment, there is much force in the contention that there should be no liability without fault. But where, as is so often the case in modern times, the defendant in an action is a public authority, nationalised industry or large commercial enterprise, or the defendant is insured against liability in the sphere in question, the justice of the rule that there should be no liability without fault becomes less apparent. Damages awarded against local authorities and commercial enterprises are ultimately borne by the rate-payers and the general body of consumers, just as damages awarded against a motorist in a 'running-down' case are borne by the motoring community. To compel the Railway Executive or an insured motorist to compensate another can hardly be reckoned an evil at all.

It is inevitable, and perhaps only just, that these considerations should affect the outcome of negligence actions. It has long been recognised that juries tend to take into account the means of the defendant in determining whether he has been guilty of negligence. And there is little doubt that judges too are influenced by such considerations. The high standard of care required of motorists, and the very large damages frequently awarded against them, are not unconnected with the institution of compulsory third-party insurance. Very soon after hospitals became the responsibility of the Minister of Health, the courts decided that the responsibility of a hospital for the torts of its professional servants was greater than was commonly supposed.[70] Though there is, it must be admitted, little likelihood that the courts will ever openly avow that the defendant's ability to pay is relevant to the question whether he will be made to pay, it does appear in fact to have a material bearing on the questions of duty and breach, and therefore should be borne in mind in prophesying the result of problems.

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It is not contended that the considerations which have been enumerated are exhaustive, or that they completely explain the results the courts come to in actions of negligence. It is, however, suggested that they do furnish a more accurate and valuable guide to the way actions of negligence are decided than the vague and even misleading formula that one must take reasonable care to avoid acts or omissions likely to injure one's neighbour.

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[70] *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343.

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MARRIAGE BROCAGE AGREEMENTS

Raphael Powell

I cannot pretend that there is any burning topical interest in my subject. However, the Athlone Press is publishing a monograph by my colleague Mr. Dennis Lloyd, entitled *Public Policy: A Comparative Study in English and French Law.* This, too, is a comparative study of public policy—a perennially current legal problem.

A marriage brocage[1] agreement for our purposes is an agreement for reward for the procurement of marriage.[2] He who procures a marriage between others without express or implied agreement for reward is no concern of the law, unless at any rate he commits a tort or crime in the course of his procuration. Nor shall we concern ourselves with the likes of those malevolent persons in *R.* v. *Thorp*[3] who conspired to persuade a boy of 18 to hate his father (whose sole heir he was), to leave Winchester and, after they had plied him with strong waters and other liquors, to marry a woman of ill name and no fortune.

VARIOUS ATTITUDES TOWARDS MARRIAGE BROCAGE

The material of my subject is not without its amusing side. The short report of *Campbell* v. *Burns and Stewart,*[4] perhaps the first of the few Scottish cases on the subject, concludes with these words, 'This process moved laughter'. One journal in which marriage agencies advertised was called *The New York Cupid.*[5] There was a French case in which the director of a matrimonial agency had been trying for ten years to find a wife for his client.[6]

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[1] 'Brocage' and 'brokage' are both correct. Many legal and non-legal sources prefer 'brocage'.

[2] F. R. Mechem, *Law of Agency* (1914), Vol. 1, § 117, p. 79.

[3] (1696) 5 Mod.Rep. 221.

[4] (1678) M. 9505.

[5] See *Duval* v. *Wellman* (1891) 26 N.E. 343; 124 N.Y. 156.

[6] Toulouse, November 5, 1900; April 20, 1904; D. 104, 1, 420, S. 1905, 1, 15.

But pride of place must go to *King* v. *Burr*[7] in which a professional matchmaker advertised in a public newspaper as follows:

'LADIES.—The delicate and restrained condition which custom imposes on females, subjects them to great disadvantages. Mrs. Morris offers to remove them. Ladies or Gentlemen who have formed predilections, may be assisted in obtaining the objects of their affections; and those who are unengaged may be immediately introduced to suitable persons; but she will not assist applicants in any marriage, if their characters are not irreproachable, and their fortunes considerable and independent. Apply, or address (post paid) at the bow-window next to Margaret Chapel, Margaret-street, Cavendish-square. Ladies, who require it, may be waited upon at their own houses'.

This advertisement was seen by the defendant, General Burr, who engaged the services of Mrs. Morris to find him a wife. Mrs. Morris was much too genteel to introduce a lady to General Burr at her own house. But she had a well-connected friend who was 'not over-burthened with wealth', and who gave routs, balls and parties to which ladies were invited from whom the General might make his selection. This friend later sued the General upon his promise to discharge the expenses of these entertainments. Lord Eldon was very short with his judgment and with counsel for the plaintiff. He said, 'Surely, Mr. Hart, you would not have a Court of Equity lend itself to such a transaction as this, to assist the plaintiff in giving ostentatious entertainments to females, for the purpose of introducing the Defendant to a marriage! He may bring his action in a court of law against this Defendant—this General—and he may sustain it if he can; but he shall have no assistance from me. Bill dismissed'.

From the legal point of view there seem to be four main methods of approach.

1. *The agreement is valid.* This, for example, is the view of Jewish law and Muhammadan law. In both systems the marriage broker can recover his expenses. In Muhammadan law he can recover any remuneration expressly or impliedly agreed between himself and his client. In Jewish law he can

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[7] (1810) 3 Mer. 693. There is a fuller report in *The Times* newspaper, August 11, 1810, repeated in *The Times* newspaper, August 11, 1910 and extracted in (1910) 26 *Law Quarterly Review*, p. 308.

claim as remuneration a percentage of the amount involved—usually the amount of the bride's dowry—and the percentage is higher than that allowed to an ordinary commercial broker.[8]

In Roman law a marriage brocage agreement was probably valid. At any rate that view of the Roman law has been accepted by the courts in this country,[9] in France[10] and in the United States.[11] The Digest contains a short title[12] relating to *proxenetae, i.e.,* brokers. It refers, *inter alia,* to claims by a *proxeneta conditionis.* Bynkershoek[13] has pointed out that *conditio* is often used in the sense of marriage,[14] so that *proxeneta conditionis* is almost certainly a marriage broker. The claim of such a broker was valid, though the brokerage was not recoverable in the ordinary course of procedure but only by the *cognitio extraordinaria.*[15] In *C.* 5, 1, 6 we have a constitution[16] dealing specifically with the subject of marriage brokers. It begins by saying that it would be better if a marriage broker took nothing at all, and that in any event he is to get nothing unless he bargains for payment. Even if he does bargain for payment, he is to receive only up to five per cent of the *dos* or *donatio ante nuptias* where the amount of such a gift is less than two hundred pounds of gold, while in no case is he to receive more than ten pounds of gold. If he bargains for more than he is entitled to receive under the constitution he must give back whatever has been paid to him already.[17]

It is not clear whether the Roman law rules have survived in Roman–Dutch law. In *King* v. *Gray*[18] Villiers, C.J., held that a marriage brocage agreement was illegal. He said that it was difficult to find any direct authority in Roman–Dutch law.

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[8] *The Jewish Encyclopaedia* (1905), Vol. 11, p. 225. See also Dayan Dr. A. Feldman, *The London Beth-Din,* 41 *Juridical Review* (1929), p. 158, at p. 168.

[9] *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, at p. 125.

[10] May 1, 1855, D. 55, 1, 147, at p. 151; S. 55, 1, 337.

[11] *Crawford* v. *Russell* (1872) 62 Barb. (N.Y.) 92, at p. 97; *Braum* v. *Potter Title & Trust Co.* (1930) 152 Atl.Law.Rep. 751, at p. 752.

[12] *D.* 50, 14.

[13] Bynkershoek, *Quaestiones Juris Privati,* Book 2, c. 6.

[14] *D.* 23, 1, 18; *D.* 23, 2, 19; *C.* 5, 1, 1.

[15] *D.* 50, 14, 3.

[16] Bynkershoek believed that this constitution should be attributed to Romanus Lacapenus, who was joint emperor with Constantine VII from A.D. 919 to A.D. 944.

[17] *Quaere* whether the whole or only the amount in excess of his entitlement.

[18] (1907) 24 S.C. 554.

The decision was accepted ten years later by a Natal court in *Pillay* v. *Yeanamoothoo*.[19] But in 1919 Mr. W. G. Hoal, after an exhaustive consideration of the Roman–Dutch commentaries, reached the conclusion that at the beginning of the nineteenth century there was an almost unanimous expression of opinion, including a carefully considered judgment of the Supreme Court, that a marriage brocage agreement is not illegal or *contra bonos mores*.[20] In Hoal's view, since the South African cases had been decided practically without reference to Roman–Dutch authorities, the question was still open. However, in *Hurwitz* v. *Taylor*,[21] a Transvaal court held a marriage brocage agreement to be contrary to public policy.

2. *The agreement creates only a 'naturalis obligatio'*. This, for example, is the view of German law,[22] Swiss law,[23] Turkish law[24] and Chinese law under the Civil Code of 1926.[25] Generally, their provisions simply declare that an agreement for marriage brocage is null and void and gives rise to no legal claim whatever. The broker has no claim for remuneration, while anything paid or given to him by his client cannot be recovered.[26] It would seem that the broker also has no claim for reimbursement of expenses; but this is debatable.

3. *The law does not specifically refer to the agreement*. If the validity or legality of a marriage brocage agreement is not touched by the law, it is clear that no universal rule can be laid down for the effect of such an agreement. Everything will depend on the general policy of the law of the particular country. In this country the original rule at common law was that a marriage brocage agreement could be enforced.[27] The first reported Scottish case on the subject[28] seems to have assumed

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[19] (1917) 38 Natal L.R. 155.

[20] W. G. Hoal, *Marriage Brokerage*, 36 *South African Law Journal* (1919), p. 352.

[21] [1926] T.P.D. 81.

[22] *Bürgerliches Gesetzbuch*, Art. 656. It seems also to have been the view of the older German law. I have not discovered whether there was any change under the Nazi government.

[23] *Code des Obligations*, Art. 416.

[24] *Code des Obligations*, Art. 408.

[25] Art. 573. I have not discovered whether the law has changed under the present government.

[26] See F. X. Tcheng Yong-Tai, *Obligations naturelles dans les droits français, allemand, suisse et chinois*, 1 *Mélanges Juridiques de l'Université L'Aurore* (1946), p. 157, and particularly pp. 190–192.

[27] See pp. 258–260, *infra*.

[28] *Campbell* v. *Burns and Stewart* (1678) M. 9505.

that the Roman law applied and the Court simply insisted that 'the pursuer must qualify relevantly that it was by his mediation and procurement the marriage followed'. A Roumanian case of 1899[29] decided that though the profession of a marriage broker was not specifically provided for by the law it was not illegal.

There is no provision in the Soviet Civil Code on the subject of marriage brocage. Professional matchmaking was once a very common institution among Slavonic peoples; but it is difficult to see how the marriage broker would fit into a society which does not favour a profit-making middleman. If, however, a Soviet court ever had to consider the validity of a marriage brocage agreement, it seems probable that recourse would be had to Article 30 of the Soviet Civil Code. This provides that a transaction for a purpose contrary to law, or in fraud of law, as well as a transaction directed to the obvious prejudice of the State, should be invalid. Then by Article 147, if a contract is invalid in this way no party has the right to claim from the other the restoration of that which the former has performed under the contract. To judge by recent Soviet legislation there seems to be an increasing tendency in favour of the stability of marriage and of restrictions on divorce.[30] If, therefore, a marriage brocage agreement were regarded as directed to the obvious prejudice of the State on the ground that it prejudicially affected the stability of marriage, we may suppose that a Soviet court would hold it to be invalid. It is not so clear, merely on the construction of the Articles which I have mentioned, that it would consider the agreement to be illegal.

4. *The agreement is illegal.* In several systems of law marriage brocage agreements are illegal. In English law and in those countries where the English rule has been adopted, that view has been maintained even till the present day. But in French law and in some other countries a more liberal principle has appeared.

(*a*) *The English development.* There can be little doubt that at common law a bond for the payment of money in respect of a marriage brocage agreement was valid.[31] At some time in the seventeenth century, however, the Court of Chancery began to grant relief against such bonds. In 1620, in *Arleston* v. *Kent*,[32] a marriage brocage bond was decreed to be cancelled, but no reason is given in the short report of the case. In *Arundel* v. *Trevillian*,[33] fifteen years later, Lord Keeper Coventry decreed cancellation of a bill. The report says that the Court utterly disliked the consideration for the bill, 'the same being of dangerous Consequence in Precedents'. Reference is made to certain precedents in which the Court had given relief in like cases against bonds of that nature. It may be that these earlier precedents related to marriage brocage bonds and that by this time it was thought that relief should be given invariably. But so general a principle was not clearly enunciated for some years to come. Thus, in several cases in the seventeenth century, the Court was willing to look at the circumstances of the particular case. For example, in *Glanvill* v. *Jennings*,[34] the defendant told the plaintiff that a certain woman, who was the defendant's kinswoman, 'was a good Fortune, and that he would help her to the plaintiff for a wife'. To secure this woman as his wife plaintiff gave defendant a bond. The defendant must have gone to the woman with a similar story, because she also gave him a bond. The plaintiff married the woman, but later he brought his bill in Chancery for relief against the two bonds, the equity being that this was a cheat, for neither husband nor wife had any fortune. The defendant managed to prove that the man had got £1,200 with his wife. But the woman being cheated because her husband had no estate, but was a broken merchant, her bond was ordered to be delivered up and cancelled. So here a bond was held good unless obtained by fraud. The Court made no reference to any general principle. The same seems to be true of *Drury* v. *Hooke*[35] in 1686, where a widower of 60 with seven children gave a bond to the defendant for his aid in procuring a marriage with a young gentlewoman who had a portion of £2,000. Mr. Finch for the plaintiff pressed the great inconvenience of such brocage, especially in the case of young persons. The report concludes with the words: 'Such Bonds are of very ill Consequence'. However, the Court was referred by counsel for the defendant to an earlier case of *Cressey* v. *Crooke*.[36] Cressey agreed with Crooke that if he could get him access to a certain rich widow he would give him a sum of money if he married her, and gave a bond to pay it. Cressey's bill in Chancery for relief against the bond was dismissed. In *Drury* v. *Hooke*, the Lord Chancellor reached a different conclusion and commented on the earlier case thus: 'Great difference of a widow forty-five years of age, and a young maiden that has no friends to advise her'. So apparently there was a presumption that a middle-aged widow could look after herself, whereas a young maiden might be presumed to be defenceless against the wiles of a matchmaker. In 1695 we have the leading case of *Hall and Keene* v. *Potter*,[37] which ultimately went to the House of Lords and the circumstances of which were to occasion further litigation in 1703 in *Scribblehill* v. *Brett*,[38] which also went to the Lords. In *Hall* v. *Potter* counsel for the respondents still contended that in the circumstances of the case no relief should be given against the bond. He argued that the bond was voluntary, that the person who gave it was of age and of sound memory. He said that there was no fraud in procuring the bond. The parties were of great quality and estate and there was no imposition or deceit by the go-between on either side to the marriage. These arguments were met by counsel for the appellants with a statement which has often been quoted[39]: 'Marriages ought to be procured and promoted by the mediation of friends and relatives and not of hirelings. The not vacating such bonds, when questioned in a court of equity, would be of evil example to executors, trustees, guardians, servants, and other people having the care of children'. All the Lords but three or four were of opinion that all such contracts concerning marriage are of dangerous consequence and not to be allowed. Presumably they must also have accepted the reasoning of counsel for the appellants.

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[29] Cass. Roumanie, January 19, 1899, S. 1901, 4, 37.

[30] See V. Gsovski, *Soviet Civil Law* (1948), Vol. 1, pp. 134–135. The Law of 1944 introduced a court procedure for divorce, and a system of publication of notice of proceedings, hearings, high fees, and the duty of the court of first instance to try to reconcile the parties, leaving to the appellate court a discretion to grant divorce if it regards divorce as necessary.

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[31] *Grisley* v. *Lother* (1614) Hob. 10; *Law* v. *Law* (1735) 3 P.Wms. 390; *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, at p. 133, *per* Collins, M.R., and at p. 137, *per* Cozens-Hardy, L.J.

[32] (1620) Toth. 27, 1 Eq.Cas.Abr. 89, pl. 1.

[33] (1635) 1 Rep.Ch. 87.

[34] (1669) 3 Rep.Ch. 31, Nels. 129.

[35] (1686) 2 Cas. in Ch. 176, 1 Eq.Cas.Abr. 89, pl. 2.

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[36] Reported only in (1686) 2 Cas. in Ch. 176.
[37] (1695) Shower 76, 3 Lev. 411.
[38] (1703) 4 Bro.Parl.Cas. 144.
[39] (1695) Shower, at p. 78.

Hall v. *Potter*, then, is probably the first case in which a general principle is laid down that all marriage brocage agreements are not to be allowed. The same general principle is found a few years later in *Scribblehill* v. *Brett*.[40] But the title under which the case is reported in Brown's Parliamentary Cases is 'Fraud'. By now, however, the Court of Chancery is clearly drawing a general conclusive inference of fraud. Nevertheless, in 1714, in *Booth* v. *Warrington*,[41] Lord Chancellor Harcourt found that there was fraud in the particular case, and on appeal to the House of Lords counsel was required to argue, *inter alia*, whether, if there was fraud, an action could have been maintained at law for damages. There is no reference in this case to the general mischievous tendencies of marriage brocage agreements. But other cases in the eighteenth century show clearly that the general principle is gaining ground[42]; and, in *Cole* v. *Gibson*,[43] the Lord Chancellor stated clearly that it is 'not for the sake of the particular instance or the person, but of the public, that marriages may be on a proper foundation'.[44] Thereafter, the general rule is settled for the Court of Chancery. In the Exchequer, too, the rule was applied in *Shirley* v. *Martin*,[45] where the Court held that a marriage brocage agreement, being avoided on grounds of public inconvenience, would not admit of subsequent confirmation by the party.

It is generally supposed that the other common law courts followed suit and also held these agreements to be contrary to the public interest.[46] But the only contemporary reference to a change of attitude is to be found in the *Treatise of Equity*, edited in 1793 with Mr. Fonblanque's notes. The learned editor says, 'But query, whether the vice of such consideration could not be pleaded at law '.[47] After the Judicature Acts, however, it was to be expected that all courts would accept the general principle that marriage brocage agreements were against the public interest; and that principle was accepted by the Court of Appeal in *Hermann* v. *Charlesworth*.[48]

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[40] (1703) 4 Bro.Parl.Cas. 144.

[41] (1714) 4 Bro.Parl.Cas. 163.

[42] See, *e.g.*, *Hamilton* (*Duke*) v. *Mohun* (*Lord*) (1710) 1 P.Wms. 118, at p. 120; *Roberts* v. *Roberts* (1730) 3 P.Wms. 66, at p. 76; *Cotton* (*Executors*) v. *Catlyn* (1736) 2 Eq.Cas.Abr. 525; *Smith* v. *Aykwell* (1747) 3 Atk. 566.

[43] (1750) 1 Ves.Sen. 503.

[44] *Ibid.*, at p. 506.

[45] (1779) 3 P.Wms. 34 n.

[46] See, *e.g.*, *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, at p. 133, *per* Collins, M.R. See, also, two United States cases—*Boynton* v. *Hubbard* (1810) 7 Mass. 112; *Overman* v. *Clemmons* (1836) 19 North Carolina (2 D. & B.) 178. The editor's footnote to the 1810 case reads: 'The learned judge seems to have entirely mistaken the principles upon which courts of equity grant relief . . . as well as the rules of the common law'.

There are few Scottish cases on the subject. In *Campbell* v. *Burns and Stewart*[49] the only question considered was one of causation. In *Buchan (Earl)* v. *Cowan*[50] the Earl had granted a bond of £1,000 to Cowan for his assistance in procuring to the Earl a rich English lady in marriage. By a decree of the Lord Chancellor the bond had been found null as *contra bonos mores*. Cowan then restricted his claim to £600, said to be expenses incurred by his staying in London some months and managing the Earl's affairs. The Lords ordered him to show in what manner the expenses were incurred, and whether his stay in London was on this account alone. In *Thomson* v. *Mackaile*[51] the pursuer pleaded[52] that the Roman law should apply 'as that law had always been considered as a part of our system' and 'it was more to be regarded than the laws of our neighbouring country, which with us had certainly no authority'. Then, in case the appeal to Roman law should not meet with the favour of the Court, he suggested that the Court was bound by the laws of no nation whatever, since the question, 'being one of general and natural law, fell to be determined by those principles which were most favourable to matrimony, and most conducive to the happiness of mankind'. The Court held the agreement *contra bonos mores,* but we still do not know whether it succumbed to the blandishments of English law or to those of the law of nature; the result, in any event, was the same.

In the United States, however, the courts from the very beginning followed the English pattern, and indeed elaborated upon it with many fanciful designs of reasoning which had not hitherto stirred the imaginative ingenuity of our English judges.[53]

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[47] He cites *Collins* v. *Blantern* (1767) 2 Wils. 341; but that case shows only that illegality can be set up as a defence to an action on a bond which is prima facie legal, and that if it is going to be set up it should be pleaded.

[48] [1905] 2 K.B. 123.

[49] (1678) M. 9505. See p. 254, *supra.*

[50] (1698) M. 9507.

[51] (1770) M. 9519.

[52] *Ibid.,* at p. 9521.

In India there had been a certain amount of resistance to the English influence, perhaps because of the existence of family-arranged marriages and of a bride-purchase form of marriage. Thus in *Pitamber Ratansi* v. *Jagjivan Hansraj*,[54] counsel for the plaintiff contended[55] that the basis of marriage and all the usages connected with it in India were wholly different from those in England. The 'public policy' to which the English cases referred was the public policy which aimed at maintaining the English social system. 'English public policy', he said, 'is not necessarily public policy everywhere'. Nevertheless, Jardine, J., held that marriage brocage is immoral and against public policy in India. In *Ram Chand Sen* v. *Audaito Sen and Srinath Sen*,[56] however, Beverley, J., said, 'No doubt marriage brokerage contracts are illegal in England, but the reason for this is that they are deemed to interfere with the free consent of the parties, which is an essential condition in the English marriage contract. But in India the consent of the parties has rarely, if ever, anything to do with the marriage contract, which is generally arranged by the parents and friends of the parties before they themselves are of an age to give a free and intelligent consent'. In the latter years of the nineteenth century, however, the law in India began to follow the English rule. Thus in *Vaithyanatham* v. *Gangarazu*,[57] it was said that the employment of hirelings tends as much to deceit on parents in India as in England. There was a complication in cases where Indian family law allowed forms of marriage in which the parents or guardians of the bride received gifts or payments from the bridegroom or his family. Here, too, however, the Indian courts, after a period of conflict, began to follow the English rule.[58]

So, then, the English law principle is that marriage brocage agreements are contrary to public policy and void. The broker can recover no remuneration for his services. Nor can he even claim reimbursement of expenses which he can prove he has incurred.[59] A client who has already paid him may get his money back.[60]

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[53] See, particularly, *Crawford* v. *Russell* (1872) 62 Barb. (N.Y.) 92; *White* v. *Equitable Nuptial Benefit Union* (1884) 76 Alabama 252, 52 Am.Rep. 325; *Duval* v. *Wellman* (1891) 26 N.E. 343, 124 N.Y. 156.

[54] (1884) reported (1888) I.L.R. 13 Bom. 131.

[55] *Ibid.*, at p. 135.

[56] (1884) I.L.R. 10 Cal. 1054.

[57] (1893) I.L.R. 17 Mad. 9.

[58] *Dholidas Ishvar* v. *Fulchand Chhagan* (1897) I.L.R. 22 Bom. 658; *Venkata Kristnayya* v. *Lakshmi Narayana* (1908) I.L.R. 32 Mad. 185; *Narayanan Nambudiri* v. *Patticharavoor* (1945) 32 A.I.R. (1945) Mad. 165, 1 M.L.J. 145.

The law has been well summarised by Sir Arnold McNair[61]: 'When an English court holds a contract in question before it to be illegal, what exactly does it mean? Not, we submit, necessarily that if the particular contract were performed, mischief of the kind aimed at by the law must result, but that the contract belongs to a category which the courts in the process of centuries have found to be mischievous and have therefore stigmatised as illegal and declined to enforce either specifically or by imposing damages for their breach. . . . In consideration of one hundred guineas promised by *A*, I procure a marriage between *A* and *B*. They really wanted to marry one another but each party lacked the courage to approach the other, and the marriage turns out to be a marriage made in heaven. No damage has been done. Quite the contrary. But the contract is a marriage brokage contract and my reward is only recoverable in heaven'. The example given by Sir Arnold McNair has been carried even further in the United States, where it has been held that even an agreement to hasten a marriage between persons already engaged to be married, or to ensure that the engagement is not broken off, is unlawful if the intermediary is paid for his services.[62]

(*b*) *The French development.* Until the present century the French view had been that such an agreement was contrary to public order and to good morals.[63] The leading case on the subject for many years was a case of 1855[64] in which M. Laborie produced a masterly *rapport* presenting the arguments for and against the validity of a marriage brocage agreement. He pointed out that the broker undertook to use all his efforts to bring off the marriage. The client promised to pay, in the event of a successful issue of the broker's efforts, a sum of money related not to his efforts or expenses but to the importance of the marriage or the size of the dowry. In these undertakings lay the illegality of the agreement because, since the broker was paid by results, he had every incentive to obtain the consent of the other party by fair means or foul and to find for his client a spouse with the highest possible fortune without regard to the suitability of the match in other respects. At that time, moreover, a marriage could not be dissolved and M. Laborie argued that this irrevocability made it doubly necessary that the marriage should be the result of the free will of the parties.[65]

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[59] *King* v. *Burr* (1810) 3 Mer. 693, p. 255, *supra.* Such a claim was allowed, however, in the United States case of *Re Grobe's Estate* (1905) 102 N.W. 804, 127 Iowa 121.

[60] *Goldsmith* v. *Bruning* (1700) 1 Eq.Cas.Abr. 89, pl. 4, *sub. nom. Smith* v. *Bruning* (1700) 2 Vern. 392; *Hermann* v. *Charlesworth* [1905] 2 K.B. 123.

[61] A. D. McNair, *Legal Effects of War* (1948), pp. 83–84.

[62] *Morrison* v. *Rodgers* (1896) 115 Cal. 256, 46 Pac. 1072, 56 Am.St.R. 95; *Jangraw* v. *Perkins* (1903) 56 Atl.Rep. 532, 76 Vt. 127, 104 Am.St.R. 917.

[63] Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1952), Vol. 2, § 88.

[64] May 1, 1855, D. 55, 1, 147, S. 55, 1, 337.

It will readily be seen, however, that there are a number of loopholes in M. Laborie's argument. There has been a gradual infiltration of modifications to the general principle, until even that general principle itself has been attacked in the present century.

(i) In spite of some opposition by M. Laurent,[66] the courts allowed the marriage broker to claim an indemnity for his expenses.[67] Indeed, according to Planiol and Ripert,[68] *la jurisprudence* has always recognised that the broker has an action *de in rem verso* to reimburse himself for his expenses, but they admit that it is hardly logical to invalidate the brocage and yet indemnify the broker.

(ii) The courts have consistently objected to claims for a remuneration based on the amount of the dowry.[69] But they have let in claims for time employed and work done—claims which to an English lawyer would appear to be for reasonable remuneration rather than for a strict indemnity. In a case of 1913[70] it was held that in default of agreement on the amount it is the duty of the judge to fix it having regard to time employed, efforts used and the amount of actual disbursements by the broker. On the other hand, in a note to cases of 1903 and

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[65] D. 55, 1, at p. 149.

[66] *Principes de Droit Civil Français,* t. 16, 151.

[67] Nîmes, June 22, 1868, D. 69, 2, 158, S. 68, 2, 170; Nîmes, March 18, 1884, S. 84, 2, 100; Lyon, January 25, 1937, S. 1937, 2, 151.

[68] *Op. cit.,* § 90.

[69] Nîmes, March 18, 1884, *supra;* Trib. Lisieux, January 21, 1903, et Pau, August 9, 1904, D. 1908, 2, 81.

[70] Lyon, October 15, 1913, S. 1914, 2, 102.

1904,[71] Planiol points out that even if an amount has been agreed between the parties, the Court can reduce that amount to the level of what we might call a *quantum meruit*.[72] It is not clear, however, whether the Court would allow reasonable remuneration in excess of the amount agreed by the parties.

(iii) At the end of the nineteenth and even at the beginning of the twentieth century, the courts were still holding that an agreement to pay a sum of money to the broker on condition that the marriage should take place was void for illegality.[73] But in 1903 the Court held that such an agreement was not necessarily illegal and must be respected as long as it is not affected by deceit or fraud.[74] In 1933 it was held that the illegality of a marriage brocage agreement no longer results merely from the fact that the broker's remuneration is dependent upon the conclusion of the marriage.[75]

(iv) The whole basis of the 1855 decision was undermined at the beginning of the twentieth century by a new line of thought resulting from the fact that divorce had become possible. As Planiol observed, marriage was no longer a prison from which one can escape only by death.[76] A number of authors began to put forward arguments in favour of the validity of marriage brocage agreements.[77] The important landmark in this development is the report of the cases at Lisieux and Pau in 1903–1904.[78] The gist of the argument in these cases is that the concept of marriage had entirely changed. The reciprocal affection of man and wife contended for by M. Laborie in 1855 no longer determined their union. Many marriages were based only on interest. '*Le mariage est devenu une affaire*'. There is an interesting note to the case by Planiol. He was clearly reluctant to accept the full implications of these cynical arguments. Even if marriage had become an '*affaire*' for some persons, Planiol said that that was no reason why the courts should see no other element in it, or why they should treat it as a purely commercial transaction. There is nothing exceptionally modern about a marriage for money; that had been shown by the satires of all times. Planiol admitted, however, that the introduction of divorce had to some extent changed the old situation. Even then marriage was still a sufficiently serious matter for the courts to guard jealously the free will of the contracting parties.

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[71] Trib. Lisieux et Pau, *supra*.

[72] See also a Roumanian case—Cass. Roumanie, January 19, 1899, S. 1901, 4, 37.

[73] Besançon, March 6, 1895, D. 95, 2, 223, S. 95, 2, 196; Toulouse, November 5, 1900, April 20, 1904, D. 104, 1, 420, S. 1905, 1, 15; Caen, February 23, 1904, S. 1905, 2, 263.

[74] Trib. Lisieux et Pau, *supra*.

[75] Colmar, November 18, 1933, S. 1904, 2, 186.

[76] Note to Trib. Lisieux et Pau, *supra*.

[77] Planiol et Ripert, *op. cit.*, § 88.

[78] *Supra*.

In the latter part of his note, Planiol accepts the inevitable and begins to rationalise. French courts had condemned matrimonial agencies in the past because the activities of these agencies so often were suspected of being or proved to be fraudulent. But the evil would be increased if they were kept out of the courts. The courts could check fraud. The courts could keep an eye on the amount of the agent's claims and prevent excessive demands.

The Lisieux case was not received entirely without opposition. In 1912 and in 1937 there were cases which harked back to the principle of the 1855 decision.[79] But in 1944 the Cour de Cassation gave a decision which affirmed the more modern principle.[80] The law today is that marriage brocage is legal as long as the agent does not resort to fraudulent or unlawful means which would falsify the consent of the parties.

Among the foreign cases cited in the French reports we find several decisions which suggest that in some other countries the modern French rule was being anticipated. Thus a Roumanian case of 1899 held that the profession of a marriage broker is not illegal and he has a right to be paid for his services.[81] A Bucharest decision of 1900 treated the broker as a *locator operarum* and held that there was nothing immoral in the marriage brocage agreement provided the means used were not fraudulent and caused the parties no moral or material prejudice in fact.[82] There was a similar decision in two Italian cases of 1903 and 1904.[83] In these cases it is pointed out that the solution reached is a realistic compromise between two points of view, both of which lead to injustices. On the one view marriage is regarded as always having a highly moral basis and the broker's contract as always having a mischievous tendency. On the other view, the moral tie is not denied, but account is taken of the economic interests which the law regulates, and therefore the broker's contract is held to be legal. Belgian decisions appear also to have been tending towards the French principle.[84]

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[79] Trib. Seine, June 3, 1912, D. 1913, 5, 21; Lyon, January 25, 1937, S. 1937, 2, 151.

[80] December 27, 1944, D. 1945, 121.

[81] Cass. Roumanie, January 19, 1899, S. 1901, 4, 37.

[82] *Ibid.*, note.

[83] Cass. Naples, October 10, 1903, Cour d'appel de Bologne, April 18, 1904, S. 1905, 4, 5.

PUBLIC POLICY AND MARRIAGE BROCAGE

There are many matters which I am unable to consider in the space of this paper. For example, I cannot deal with the application of rules invalidating marriage brocage to agreements for reward to obtain the consent of a parent or guardian to the marriage of a child or ward. With that question is connected the problem of the impact of these invalidating rules on native marriage customs, particularly customs relating to bride-purchase. Nor can I consider the devices used to try to evade the general rules.

I shall conclude this paper, therefore, by analysing and attempting to evaluate the considerations of public policy which have been suggested at different times. Many of the earlier English cases give vague general reasons such as the 'dangerous consequences' of marriage brocage agreements and the 'infinite mischief' to which they tend.[85] In an early American case, *Boynton* v. *Hubbard*,[86] the Court refers to a 'tendency to cause matrimony to be contracted on mistaken principles'. In some of the earlier cases and many of the later cases, the courts mention more specifically the kind of danger or mischief or public inconvenience which may result from marriage brocage agreements. In the earlier cases it is not surprising to find references to a 'tendency to ruin persons of quality and fortune',[87] or the 'prejudice and discomfort' which may be caused to 'the best of families'.[88] Both in this country and in India, repeated

[84] Trib. Anvers, March 14, 1894, Pasicr. belge, 1894, 3, 171; Trib. Nivelles, February 11, 1902, S.etP. 1902, 4, 24; Cass. belgique, March 16, 1905, S. 1908, 4, 22.

[85] *Arundel* v. *Trevillian* (1635) 1 Rep.Ch. 87; *Drury* v. *Hooke* (1686) 2 Cas.in.Ch. 176; *Hall* v. *Potter* (1695) Shower 76; *Law* v. *Law* (1735) 3 P.Wms. 390; *Cole* v. *Gibson* (1750) 1 Ves.Sen. 503.

[86] (1810) 7 Mass. 112.

[87] *Hall* v. *Potter* (1695) Shower 76.

[88] *Ibid,; Law* v. *Law* (1735) 3 P.Wms. 390, at p. 392.

reference is made to the argument that marriage should be procured by friends and relations and not by hirelings.[89] In the United States it is said that marriage brocage 'countervails parental influences in the training and education of children'.[90] However, in the Scottish case of *Thomson* v. *Mackaile*,[91] the pursuer argued that there was greater danger where the influence was exercised by a parent or guardian than where it was exercised by a person who had no authority over or relationship to the person sought to be influenced—an argument which has some parallel in English law in connection with the admissibility of confessions in criminal cases.

The youth of the person influenced has sometimes been stressed.[92] On this issue there was inevitably some difference of opinion in India while child marriages were recognised.[93] But in 1897, Farran, C.J., urged that the duty of the parent was even more direct and imperative where the child to be married was of tender years and had no voice in the matter[94]; and even earlier the courts had shown some revulsion against the purchase or hire of a minor girl for purposes of prostitution or concubinage.[95] More recently, in 1930, an Indian court has disapproved of an agreement which was in substance a bargain and sale of a minor girl in marriage.[96]

It is clear from several cases that the courts have been concerned with a special danger to women, and particularly young women. In *Drury* v. *Hooke*[97] the Lord Chancellor called the efforts of a marriage broker 'a sort of kidnapping into a state of conjugal servitude'. In *Williamson* v. *Gihon*[98]—an Irish case—counsel for the defendant stated that the nature of marriage brocage is 'a kind of dealing for the disposal of a lady by a person who has influence over her, as he would dispose of goods'. In India, Scott, J., in the *Pitamber Ratansi Case*[99] said that the enforcement of marriage brocage agreements would tend to 'still further degrade the position of women and to perpetuate the inequality of their relations with the other sex'.

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[89] See pp. 260 and 263, *supra; Visnavathan* v. *Saminathan* (1889) I.L.R. 13 Mad. 83, at p. 84; *Vaithyanatham* v. *Gangarazu* (1893) I.L.R. 17 Mad. 9.

[90] *Crawford* v. *Russell* (1872) 62 Barb. (N.Y.) 92 at p. 98; *White* v. *Equitable Nuptial Benefit Union* (1884) 76 Alabama 252, at p. 258; *Mechem, op. cit.*, § 117.

[91] (1770) M. 9519.

[92] *Cressey* v. *Crooke*, p. 260, *supra*; *Drury* v. *Hooke* (1686) 2 Cas.in.Ch. 176, at p. 177; *Goldsmith* v. *Bruning* (1700) 1 Eq.Cas.Abr. 89, pl. 4; *Cole* v. *Gibson* (1750) 1 Ves.Sen. 503, at p. 506; *Hermann* v. *Charlesworth* [1905] 1 K.B. 24, at p. 28; *Braum* v. *Potter Title & Trust Co.* (1930) 152 Atl.Law.Rep. 751.

[93] *Ram Chand Sen* v. *Audaito Sen & Srinath Sen* (1884) I.L.R. 10 Cal. 1054, at p. 1057; *Visnavathan* v. *Saminathan* (1889) I.L.R. 13 Mad. 83 at p. 84; *Vaithyanathan* v. *Gangarazu* (1893) I.L.R. 17 Mad. 9.

[94] *Dholidas Ishvar* v. *Fulchand Chhagan* (1897) I.L.R. 22 Bom. 658, at p. 661.

[95] *Ram Chand Sen* v. *Audaito Sen & Srinath Sen* (1884) I.L.R. 10 Cal. 1054, at p. 1056.

[96] *Atma Ram* v. *Banku Mal* (1930) A.I.R. (1930) Lahore 561, I.L.R. 11 Lahore 598.

[97] (1686) 2 Cas.in.Ch. 176.

In many cases the marriage itself is considered—not only its formation but also its later stability. In several countries, the courts say that 'marriages ought to be free and open'.[1] That means, in particular, that:

(*a*) the consent to the marriage must be free. In a French case of 1904 in which this principle was stressed,[2] a woman broker wrote to her client that it was by a *tour de force* that she had brought off the marriage, thereby recognising—so the Court said—that she had snatched[3] a consent which would not have been given spontaneously. However, though there are French cases which stress the need for freedom of consent, it has also been contended in France that a marriage broker does not dispose of the consent of the parties. He simply promises his activity, his information, and his competence.[4] M. Laborie—acting as devil's advocate, it is true—suggests that the broker does not really influence the decision of the parties, but leaves them complete freedom for their own appreciation of the facts.

(*b*) the arrangements for the marriage must be open and not subject to any underhand influences. Such a principle was no doubt designed to guard against secret property arrangements in which family interests were not consulted, and against the possibilities of clandestine marriages. It may be doubted whether much importance can be attached to either reason in modern times.

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[98] (1805) 2 Sch. & Lef. 357, at p. 360.

[99] (1884) reported (1888) I.L.R. 13 Bom. 131, at p. 136.

[1] *Roberts* v. *Roberts* (1730) 3 P.Wms. 66, at pp. 74, 76; *Debenham* v. *Ox* (1749) 1 Ves.Sen. 276; *Visnavathan* v. *Saminathan* (1889) I.L.R. 13 Mad. 83, at p. 84, where Wilkinson, J., doubted whether the principle could be applied to India; *Nbono* v. *Manoxoweni*, 6 E.D.C. 62, where Maasdorp, J., doubted whether it could be applied to a native customary union in Africa; Voet, *Commentaries*, 2, 14, 21, translated Buchanan, 1880, p. 353; Planiol et Ripert, *op. cit.*, § 88; M. Laborie in May 1, 1855, D. 55, 1, at p. 149; *Morrison* v. *Rodgers* (1896) 46 Pac. 1072, at p. 1073; and many other cases.

[2] Caen, February 23, 1904, S. 1905, 2, 263.

[3] *arraché*.

[4] May 1, 1855, D. 55, 1, 147, S. 55, 1, 337.

On a somewhat higher, and perhaps inevitably more nebulous, plane are those statements which urge the preservation of the 'purity of matrimony'[4] or of the 'dignity of marriage'.[5] In France it has been strongly urged that marriage is not an object of commerce, and that there cannot be any trade in consent to a marriage.[6] We have seen, however, that against this it has been argued that the marriage broker does not deal in marriages or in consents to marriage but in the supply of introductions between, and information about, the parties to a possible marriage. Perhaps this argument is more specious than real.

It is often said that marriages should be arranged and entered into for motives other than private interest—and private interest almost invariably has meant private pecuniary interest.[7] Having regard to the fact that marriages from time immemorial have been linked up with considerations of the economic interests not only of the parties to the marriage but even of their families, one cannot help feeling that the argument is somewhat hypocritical. A parent may take a lively interest in the economic condition of a potential son-in-law from whose largesse he may benefit directly or indirectly for the rest of his life; but a broker who brings about an introduction between two wealthy families is not to receive one penny for his efforts. Perhaps it was this thought which unconsciously inspired Dawson, J., of the Supreme Court of Kansas in *Mason* v. *McGugin*.[8] He said,[9] 'Of course the courts must not be too finical about the enforcement of contracts which are merely mercenary, improvident or whimsical, or in which corrupt or sinister incidents are only remotely inferable . . . but the attitude of the judiciary has always been

[5] Colmar, November 18, 1933, S. 1934, 2, 186; Lyon, January 25, 1937, S. 1937, 2, 151.

[6] Caen, February 23, 1904, S. 1905, 2, 163.

[7] *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, at p. 130, *per* Collins, M.R.; *Narayanan Nambudiri* v. *Patticharavoor* (1945) A.I.R. (1945) Madras 165, at p. 166; G. Ripert, *La Règle Morale dans les Obligations Civiles*, 1949, pp. 52, 54; *Morrison* v. *Rodgers* (1896) 46 Pac. 1072, at p. 1073; *Braum* v. *Potter Title & Trust Co.* (1930) 152 Atl.Law.Rep. 751, at p. 753.

[8] (1925) 236 Pac. 845.

[9] *Ibid.*, at p. 146.

distinctly reserved or actively hostile . . . where the parties seem to have had in mind some project . . . to meddle with marital and family relations'.

There are several suggestions—mostly in argument or *obiter*—that marriage brocage leads to unhappy marriages.[10] It may be doubted whether in this respect, as in some other respects, the courts have had adequate statistical evidence of such a consequence. A recent investigation by Slater and Woodside states that their findings 'suggest no final answer to the often debated topic of the superiority of the arranged over the romantic marriage'. They offer the view that 'the desirability of an arranged marriage depends to some degree on the opinion of the individual regarding the purpose of marriage'.[11]

Finally, there are repeated references to the possibility of corruption, fraud, and undue influence not only by the broker but also by persons having some control over the party whose consent to a marriage is to be obtained.[12] The *Irish Law Times,* commenting on the decision in *Hermann* v. *Charlesworth,* said that it seemed to be 'a salutary check to a business which lends itself readily to the swindling of silly people, and may easily lead to blackmail and gross abuses'.[13] In a note to *King* v. *Gray,* the *South African Law Journal* suggested that 'the party entrapped into an unsuitable marriage by the most glaring falsehoods would probably be ashamed to publish the fact that he had employed a matrimonial agency'.[14]

It is possible that a good case can be made for the recognition of the validity of marriage brocage contracts, at any rate in communities where they would be recognised as providing for a social need. Among the reasons which have been put forward in their favour are the seclusion of women, the lack of opportunity for families or individuals to get to know each other, or the arrival of large numbers of immigrants in a strange land. Not all these reasons are valid in every place or at all times.

[10] *Hall* v. *Potter* (1695) Shower 76; *Scribblehill* v. *Brett* (1703) 4 Bro.Parl.Cas. 144, at p. 148; Mechem, *op. cit.,* p. 79; *Crawford* v. *Russell* (1872) 62 Barb. N.Y. 92, at p. 98; *Johnson* v. *Hunt* (1883) 81 Ky. 321, at p. 325; *White* v. *Equitable Benefit Union* (1884) 76 Alabama 252, at p. 258.

[11] Slater and Woodside, *Patterns of Marriage* (1951), at p. 126.

[12] See pp. 269–270, *supra.* See also *Duval* v. *Wellman* (1891) 26 N.E. 343; 124 N.Y. 156.

[13] (1909) 35 *The Irish Law Times,* p. 165.

[14] (1907), 24 *South African Law Journal,* p. 496.

It is also argued that the promotion of marriage is good for society, but obviously this may be countered by the argument that the promotion of unsuitable marriages may be bad for society. A more realistic attitude is represented by the contention that it is better that the parties to a marriage should be able to exchange information about each other before the marriage rather than after the marriage. After all, it is not so easy to return a wife or a husband for a latent defect as it is to return a defective bicycle; and the disappointed party cannot generally get damages from his or her spouse. Whether it is desirable that the information should be supplied through a paid agent is another matter. M. Laborie thought that it would be undesirable if such an agent, when suing or sued by his principal, should be enabled to disclose in public the methods by which he had obtained his information. On the other hand, there may be evidence for the possibility that selective mating leads to the best marriages.[15] Suppose that Jack requires in his wife qualities p, q, r and s. He can of course take a chance that the wife he finds may have these qualities. But it is just as possible that she will have qualities p, q, t and v, and t and v may be the qualities which Jack dislikes most in his Jill. It would seem to be not unreasonable that Jack should be able to pay someone who is an expert in classifying the qualities of his clients and who could supply a number of Jills with the right qualities for Jack to make his selection. Obviously there must be safeguards to ensure that neither Jack nor Jill is defrauded or overreached in any way. Matchmakers are notoriously prone to exaggerate the qualities of their customers, and it may be that paid marriage brokers tend to claim high fees for their services. The French solution of the marriage brocage problem appears to be well fitted to prevent deception and extortion. It may be also that the law would have to devise for marriage brokers the terms upon which they should be entitled to their remuneration. Perhaps in the circles we are considering there has already grown up the matrimonial equivalent of the 'able, ready and willing purchaser' with whom the estate agent is so familiar, and the broker is entitled to his remuneration when he has found that equivalent for his client.

[15] See Slater and Woodside, *op. cit.*, pp. 126, 128.

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RECENT PRACTICE IN THE LAW OF EXTRADITION

L. C. Green

Extradition may be defined as 'the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender'.[1] It is the 'process by which fugitives from the justice of one State who seek asylum in another State are delivered up by the latter to the former'.[2]

In *Re Arton,*[3] Lord Russell, C.J., pointed out that 'the law of extradition is . . . founded upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice'. It should be noted that Lord Russell referred to the 'comity of nations' and not to 'international law', for 'the principles of international law recognise no right to extradition apart from treaty'.[4] Although this is true, it would certainly not be in accordance with comity to afford a right of asylum so wide as to connote 'a deliberate invitation, . . . to the malefactors of other countries, to come within the peace of the King. . . . [This would seem] to set one country up as deliberately aiding by its protection those who offend against the laws of neighbouring States',[5] but it will be seen shortly that this proscription does not extend to political offenders. In some

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[1] *Terlinden* v. *Ames* (1902) 184 U.S. 270, at p. 289.

[2] Hackworth, 4 *Digest of International Law,* p. 1; see also 14 *Halsbury's Laws of England* (2nd ed.), p. 522.

[3] (No. 1) [1896] 1 Q.B. 108, at p. 111.

[4] *Factor* v. *Laubenheimer* (1933) 290 U.S. 276, at p. 287. See on the connection between extradition and international criminal law, Schwarzenberger, *The Problem of an International Criminal Law,* 3 *Current Legal Problems* (1950), p. 263, at pp. 271–272.

[5] Piggott, *Extradition* (1910), p. 6.

States this is embodied in the Constitution. Article 10 of the Italian Constitution, 1947, provides that 'the foreigner who is denied in his own country the effective exercise of democratic freedoms provided by the Italian Constitution'—and deprivation of political rights is a recognised judicial sentence in Eastern Europe—'has a right to asylum in the territory of the Republic'.[6]

Territorial asylum is the counterpart of extradition and must be distinguished from diplomatic asylum. 'In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State. In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State'.[7]

THE CONDITIONS OF EXTRADITION

It has already been indicated that the right of extradition is created by treaty, but many systems require a legislative measure in order to bring the treaty into operation. In Great Britain the situation is governed by the Extradition Act, 1870.[8] By section 2, if a treaty exists, the Crown may make an Order in Council extending the operation of the Act to the country in question, while by section 26 a fugitive criminal is defined as 'any person accused or convicted of an extradition crime (listed in the schedule) committed within the jurisdiction of any foreign State who is in or is suspected of being in some part of Her Majesty's dominions'.

It should not be thought, however, that extradition only applies between sovereign States. The process equally enters into the relations between the various parts of Her Majesty's dominions, whether self-governing or not, although in this field the situation is governed not by the Extradition Acts, but by the Fugitive Offenders Act, 1881.[9] This type of *inter se* extradition is described as rendition and, generally speaking, the rules and law applicable are the same as for extradition under the Extradition Acts. Thus, the definition of 'fugitive' in section 2 of the Fugitive Offenders Act is practically identical with that in the Extradition Act, and in *Ex p. Ezekiel,*[10] Humphreys, J., supported his interpretation of section 2 by referring to *R.* v. *Nillins*[11] and *R.* v. *Godfrey,*[12] both of which were 'decided upon the very similar definition of "fugitive criminal" to be found in the Extradition Act, 1870'. Similarly, in neither extradition nor rendition need the offender have been present in the country where the offence was committed nor be a fugitive from that country in the ordinary sense of the word. In *Godfrey's Case* the applicant was extradited for false pretences in Switzerland although he had not been in that country at the time the pretences were made, nor since. Likewise, in *Re Henderson* the term 'fugitive' in the 1881 Act was held to apply 'not merely to a person who has left one part of His Majesty's dominions for the express purpose of avoiding trial, but to any person who is accused of having committed an offence in one part and is found in another part of His Majesty's dominions'.[13] In this paper, therefore, no distinction will be drawn between extradition and rendition.

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[6] Peaslee, 2 *Constitutions of Nations* (1950), p. 280.

[7] *Asylum Case, I.C.J. Reports 1950,* p. 266, at p. 275.

[8] The amending legislation of 1873, 1895, 1906 and 1932 merely extended the scope of the 1870 Act and the list of extraditable crimes.

[9] 44 & 45 Vict., c. 69.

Rendition in a federal State like the United States serves a different purpose. By Article IV, section 2 of the Constitution, 'a person charged in any State . . . who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up'.[14] *Biddinger* v. *Commissioner of Police* indicated that 'the language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another. . . . Its design was, and is, in effect to eliminate, for this purpose, the boundaries of States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land'.[15]

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[10] [1941] 2 All E.R. 546, at p. 549.
[11] (1884) 53 L.J.M.C. 157.
[12] [1923] 1 K.B. 24.
[13] [1950] 1 All E.R. 283, at p. 286, *per* Tucker, L.J.
[14] Peaslee, 3 *op. cit.*, p. 369.

The practical significance of the distinction is perhaps made clear by a comparison between *Ex p. Moser*[16] and *U.S.* v. *Godwin.*[17] In the former a French convict escaped to the United Kingdom. In the *habeas corpus* proceedings the applicant contended that 'prison breach' was not extraditable under either the 1870 Act or the Anglo-French Extradition Treaty, 1876,[18] but it was held that, under section 10 of the Act, the applicant was 'a fugitive criminal alleged to have been convicted of an extradition crime' and, by section 1 of the Treaty, a person 'convicted of crime'. In *Godwin's Case* the defendant escaped from custody while awaiting removal to another State. The District Court held that he was not awaiting extradition, for 'extradition involves a demand by one sovereign upon another sovereign to surrender a fugitive for trial and the consequent surrender of such person to the demanding sovereign. The judicial districts of the United States are in no respect sovereign, but are simply convenient sub-divisions of the country for the conduct of the judicial business of one sovereign, the United States'. Surprisingly enough, rendition does not operate between Trieste and Italy, and in 1952 Italy refused to recognise the sentence passed by a British magistrate in Trieste on an Italian who escaped from there to Italy.[19]

The process of extradition in the United Kingdom is set in motion by a request from the demanding State for the arrest of the accused on an extradition warrant. The accused then appears before a magistrate who has to ascertain that the offence is one falling within both the Treaty and the Act, and criminal according to English law as well as the law of the demanding State. There is no need, however, that the offence be known by the same name in both jurisdictions. According to Darling, J., 'the essential thing was to see whether what the evidence showed prima facie what the prisoner had done was a crime in both countries and within the treaty'.[20] Similarly, in the United

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[15] (1917) 245 U.S. 128, at pp. 132, 133.

[16] [1915] 2 K.B. 698.

[17] (1951) 97 F.Supp. 252 (W. D. Ark.), cited in *The Annual Survey of American Law* (1951), p. 822.

[18] Piggott, *op. cit.*, p. 98.

[19] *The Times* newspaper, June 23, 1952.

[20] *R.* v. *Dix* (1902) 18 T.L.R. 231.

States 'the law does not require that the name by which the crime is described in the two countries shall be the same. . . . It is enough if the particular act charged is criminal in both countries'.[21]

So long ago as 1900 a magistrate changed a charge of obtaining by false pretences into one of 'fraud by an agent and larceny by a bailee', both of which were covered by the Anglo-German Treaty, 1872.[22] Dismissing the application, Grantham, J., held: 'the act was the same, but it was called by a different name in each country. . . . The magistrate simply changed the description of the offence charged into the description under which the act alleged was known in English law. If that could not be done Extradition Treaties would be of no value'.[23] In the *Eisler Case*,[24] however, the magistrate found that the offence charged was 'something akin to perjury'. Since the false statements were made in an administrative and not a judicial proceeding, he concluded that they could not 'come under the technical head of perjury'. It has been pointed out that Federal perjury with which Eisler *might*[25] have been charged would have constituted a misdemeanour under the Perjury Act.[26] He was charged with making false statements in an application to leave the United States. 'This basis was chosen since the offence could then be represented as equivalent to perjury, an offence made extraditable under the Anglo-American Extradition Treaty,[27] whereas the offence of contempt of Congress, for which Eisler had been convicted in the United States, could not be brought under the offences listed in the treaty'.[28] If this be true, it adds point to Professor Keeton's comment that it was 'generally felt that this charge was the thinnest cover for activities which were directly connected with Eisler's political opinions'.[29]

If the magistrate rejects the request for extradition the matter is ended, but if he finds for the requesting State the accused may apply for a writ of *habeas corpus*. The usual grounds on which such an application rests are that the offence is political and so non-extraditable under section 3 of the 1870 Act, or else that the evidence is too slight to constitute a prima facie case sufficient to warrant it being committed to a jury had the charge originally been brought in the United Kingdom. In *Ex p. Frenette* (1952)[30] the applicant was charged, under the Anglo-Italian Treaty, 1873,[31] with murder in Sicily, and was granted a writ of *habeas corpus* for insufficient evidence to leave to a jury. In *Ex p. Penn* (1952)[32] rendition to India was refused as 'there was not the least ground for returning the applicant for trial'.

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[21] 35 *Corpus Juris Secundum*, s. 26, p. 354.

[22] Piggott, *op. cit.*, p. 106.

[23] *R.* v. *Holloway Prison* (*Governor*) (1900) 16 T.L.R. 247, at p. 248.

[24] *The Times* newspaper, May 28, 1949.

[25] Finch, *The Eisler Extradition Case*, 43 *American Journal of International Law* (*A.J.I.L.*) (1949), p. 487, at p. 489.

[26] 1 & 2 Geo. 5, c. 6, s. 5.

[27] 1935, CLXIII, *League of Nations, Treaty Series* (*L.N.T.S.*), p. 59.

[28] *Annual Survey of American Law* (1949), p. 14.

[29] *The Eisler Case*, 16 *The Solicitor* (1949), p. 146.

The conditions of extradition may be summarised as follows: 'the imputed crime must be within the treaty: it must be a crime against the law of the country demanding extradition; it must be a crime within the English Extradition Acts . . .; and there must be such evidence before the committing magistrate as would warrant him in sending the case for trial, if it were an ordinary case in this country'.[33]

EXTRADITION 'IN REVERSE'

The cases so far indicated all concerned extradition from this country, but problems also arise in connection with what might well be termed extradition 'in reverse'. In 1829, before the enactment of the Extradition Act, Lord Tenterden, C.J., was of opinion that the English courts could not inquire into the legality of the foreign arrest which led to the accused's appearance in an English court.[34] In 1890 it was put even more plainly. There was then no extradition treaty between the United Kingdom and Portugal, but the applicant was arrested near Lisbon and, without any proceedings being instituted, was placed on an English ship and brought back on a charge of theft. The Lord Justice-Clerk said that 'if the Government of Portugal or Spain has done anything illegal or irregular in arresting or delivering over the complainer his remedy is to proceed against these

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[30] *The Times* newspaper, March 19, 1952.

[31] Piggott, *op. cit.*, p. 124.

[32] *The Times* newspaper, October 16, 1952; 96 S.J. 696.

[33] *Re Arton* (No. 2) [1896] 1 Q.B. 509, at p. 513, *per* Lord Russell, C.J. See also *Padhan* v. *Emperor*, A.I.R. (33) 1946 Patna 196; *Mangilal* v. *Sarkar, The Indian Digest* (1947), p. 472; *Ram Pargas* v. *Emperor*, A.I.R. (35) 1948 Allahabad 129; and *Saksena* v. *The State*, A.I.R. (37) 1950 Supreme Court 155.

[34] *Ex p. Scott* (1829) 9 B. and C. 446, at p. 448.

Governments. That is not a matter for our consideration at all, and we cannot be judges of the regularity of such proceedings'.[35]

The problem was considered most recently in *Ex p. Elliott*. A deserter had been arrested in Brussels by British military police, in the presence of Belgian police officers, and was brought to England. Dismissing his *habeas corpus* application, Lord Goddard, C.J., pointed out that 'if a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear . . . he is charged with an offence against English law, the law applicable to the case. . . . We have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here'.[36]

Similar rules apply in the United States. The problem came before the Supreme Court in *Ker* v. *Illinois*.[37] The plaintiff had been kidnapped in Peru and brought back to the United States to stand trial for larceny. The Court upheld the jurisdiction of Illinois, while pointing out that Peru could, in accordance with the Extradition Treaty of 1870,[38] institute proceedings for the extradition of the kidnapper. Likewise, when a defendant charged with mail-fraud, which is not covered by the Anglo-American Treaty, 1842,[39] was abducted from Canada it was held that, although England or Canada might possess a right under international law to demand the surrender of the abducted party, 'the mere fact . . . that the defendant was kidnapped from British Columbia would not give this court power to examine such fact, and, if true, release the defendant'.[40] Neither kidnapping nor abduction was involved in *U.S.* v. *Dixon*.[41] The defendant, without any extradition proceedings, had been transferred to the United States authorities by the British consul in Spanish Morocco, but the Court held that it was not entitled to consider how Dixon was brought within its jurisdiction.

By section 19 of the 1870 Act the surrendered person must be given an opportunity to return to his country of refuge before being tried for a crime other than that for which he has been extradited and this principle appears in Article 4 of the Anglo-French Treaty, 1876.[42] The section goes on, however, to permit trial for such 'crimes as may be proved by the facts on which the surrender is grounded'. The apparent incompatibility was tested in *R.* v. *Corrigan.*[43] The accused had been arrested in France for obtaining by false pretences and he consented to be handed over without the completion of extradition formalities. In England he was indicted not for false pretences but fraudulent conversion and was convicted. He appealed, but it was considered by the majority of the Court that there had never been any extradition or surrender, and that he had appeared at the Central Criminal Court in lawful custody on lawful committal on a lawful warrant. It was further held that Article 4 of the treaty did not abrogate section 19 of the statute: 'assuming here a surrender made under the extradition law, it must have been based upon the facts contained in the information and depositions, which disclose not only offences of obtaining money by false pretences, but facts by which fraudulent conversion of such moneys may be proved'. A year earlier a somewhat similar decision had been rendered in Canada. A Canadian, when arrested in the United States for false pretences, waived his extradition rights, and on his return to Canada was charged with another accused for conspiracy, a non-extraditable offence, and convicted.[44]

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[35] *Sinclair* v. *H.M. Advocate* (1890) 17 R. (J.C.) 38.

[36] [1949] 1 All E.R. 373, at pp. 376, 377.

[37] (1886) 119 U.S. 436.

[38] 2 Malloy, *Treaties, etc., between the United States of America and Other Powers*, p. 142.

[39] Piggott, *op. cit.*, p. 246.

[40] *U.S.* v. *Unversagt* (1924) 299 Fed. 1015 (*Annual Digest and Reports of Public International Law Cases* (*Annual Digest*) (Supplementary Volume) (1919–1942), p. 101, at p. 104).

[41] (1947) 73 F.Supp. 683.

POLITICAL OFFENCES

It was indicated above that States normally grant asylum to political offenders, and as early as 1851 Palmerston described this principle as the 'one rule, more than any other, [which] has been observed in modern times by all independent states, both small and great, of the civilised world'.[45] This rule is given statutory effect by section 3 of the 1870 Act which forbids surrender for political offences, or if the applicant proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character. There is, however, no definition of 'political' and it is here that difficulties invariably arise.

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[42] See note 18, *supra.*

[43] [1931] 1 K.B. 527, at p. 533.

[44] *R.* v. *Liberty* [1930] 1 D.L.R. 892.

[45] Cited in Neumann, *Neutral States and the Extradition of War Criminals,* 45 *A.J.I.L.* (1951), p. 495, at p. 505, n. 58.

It might well be thought that any offence committed from a political motive or with a political end would fall within the reservation, but in *Re Castioni*,[46] John Stuart Mill's definition[47] covering 'any offence committed in the cause of or furthering of civil war, insurrection, or political commotion' was expressly rejected, at least in so far as it meant 'any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it'. In that case it was clearly laid down that, to qualify as a political offence, 'it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands', and this definition has received well-nigh universal approval. Thus, in *Re Ezeta*,[48] a United States court pointed out that 'to bring an offence within the meaning of the words "of a political character" it must be incidental to, and form part of, political disturbances'.

There may be some question, however, how far professional revolutionaries or assassins would be covered by the exception. In *Re Meunier*[49] it was reaffirmed that 'there must be two or more parties in the State each seeking to impose the Government of their own choice on the other, and the offence [must be] committed by one side or the other in pursuance of that object', with the result that an anarchist was not regarded as having committed a political crime. This attitude finds expression in the treaty between Italy and Panama, 1930, and between Colombia and Peru, 1932,[50] while others include an *attentat* clause to exclude attempts against the Head of the State. The latest example of such a treaty is the Franco-German Treaty, 1951,[51] which excludes from extradition nationals—a frequent reservation—deserters and political offenders, other than those 'accused of a crime against the head of the State or "important political personage"'.

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[46] [1891] 1 Q.B. 149, at pp. 156–157.

[47] House of Commons, August 6, 1866 (*Hansard*, 3rd series, Vol. 184, col. 2115).

[48] (1894) 62 F. 972, at p. 999.

[49] [1894] 2 Q.B. 415, at p. 419.

[50] CXL *L.N.T.S.*, p. 257; CLXXIV *ibid.*, p. 79.

[51] *The Times* newspaper, September 12, 1951.

The attitude towards anarchists has led one recent writer to comment that 'treaties and practice as well as the opinion of prominent writers all indicate that anarchy is by general consensus excluded from the realm of political crimes'.[52] He goes on to point out that some treaties expressly exclude crimes 'connected with Communist movements',[53] and even 'seditious acts committed individually or collectively with anarchist or social revolutionary aims'.[54] On the other hand, in a recent case an anti-Communist found that his political motives did not cover his offences with the aura of respectability from the point of view of extradition. In *Re Giovanni Gatti*[55] the Communist government of San Marino secured the extradition from France of an accused who had been sentenced by default for the attempted homicide of a member of a Communist cell. The French court pointed out that 'political offences are those which injure the political organism, which are directed against the constitution of the Government and against sovereignty, which trouble the order established by the fundamental laws of the State and disturb the distribution of powers. . . . What distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the State, the proper rights of the State, while the latter exclusively affects rights other than those of the State. The fact that the reasons of sentiment which prompted the offender to commit the offence belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offender but from the nature of the rights it injures'.

It may well be that the present period of cold war calls for a complete review of this type of political offence. In view of the Communist conspiracy against democratic government[56] it is perhaps time to reconsider the whole problem of political offences in so far as they are committed by Communists. Perhaps the western world should treat Communists as if they were anarchists and to reduce them almost to a position of *hostes humani generis* where the democratic world is concerned. The issue is not purely academic, for some countries have proscribed Communism, while others have taken legal action against its leaders. Some of the persons affected might easily commit perjury to avoid conviction on such political charges and then seek asylum abroad. Here one can only ask how far the local court should apply the traditional conception of political offence in order to refuse extradition. On the other hand, it can be equally contended that the rule of law should be preserved uncorrupted and protection be extended even to a Communist.

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[52] Hambro, *New Trends in the Law of Extradition and Asylum*, 5 *Western Political Quarterly* (1952), p. 1, at pp. 10–11.

[53] Hungary and Yugoslavia, 1928, CIV *L.N.T.S.*, p. 153, at p. 155.

[54] Bulgaria and Spain, 1930, CXIV *ibid.*, p. 41, at p. 45.

[55] (1947), Court of Appeal, Grenoble (*Annual Digest*, 1947, p. 145).

[56] See, for example, U.S. House of Representatives Committee Report on 'The strategy and tactics of world Communism' (1948).

It should be remembered, however, that municipal courts normally presume that a foreign State acts bona fide and will proceed with caution before admitting a plea that political motives lie behind what appears to be a straightforward request for extradition. Thus, in *Re Arton,*[57] an applicant who was charged with falsification of accounts and the like, contended that the demand was not made in good faith and that his surrender was demanded for political motives. He was told that 'the Court cannot permit you to argue the point that a friendly State is not acting in good faith in making the application: that is not a question which the judicial authorities of this country have any power to entertain'. Similarly, in the *Mubarak Ali Case,*[58] Lord Goddard, C.J., adopted the same approach in a case of inter-Commonwealth rendition. It had been alleged that the request for surrender was really motivated by political victimisation, and the Lord Chief Justice stated that the accused was on trial for forgery and fraud when he fled and that it would be an insult to the Indian courts to refuse to return him, alleging that he would not get a fair trial.

Perhaps the most famous of all recent extradition cases, and one in which accusations of bad faith were levelled against the requesting country both in the House of Commons and in the press, was that concerning Gerhart Eisler. In 1941 Eisler, a leading German Communist, arrived in the United States carrying a certified transit certificate issued by the American consul at Marseilles authorising him to apply for passage on his way to Mexico from a Vichy concentration camp. He was held at Ellis Island and found to be 'deportable' but was advised that he would be permitted to leave by boat 'at the first opportunity'. This permission was revoked and he was released on bond. Despite numerous requests for permission to depart he was not allowed to leave and in 1945 he completed an Alien Departure Permit Application to go to Berlin. This was refused, but in 1946 permission was given for Eisler and his wife to leave for the Soviet Union. Before the vessel sailed the permission was cancelled and in 1947 Eisler was convicted for making false statements concerning his political connections and activities in the 1945 Application.[59] While on bail pending an appeal, Eisler secured a passage on board the Polish ship *Batory* which was travelling from the United States to Poland.

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[57] (No. 1) [1896] 1 Q.B. 108, at p. 110, *per* Lord Russell, C.J.

[58] *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All E.R. 1060, at p. 1063.

When the *Batory* reached Southampton she was boarded by British police officers accompanied by United States representatives. In the presence of Polish diplomatic representatives Eisler was informed that he was wanted to answer extradition proceedings instituted at the instance of the United States. On his refusal to accompany the officers Eisler was forcibly removed from the vessel despite the protests of her master.[60] He was then charged at Southampton and Bow Street with perjury, an extradition offence, in connection with the form he had completed in 1945. Poland protested against the removal from the *Batory* and contended that the whole proceeding was contrary to international law.[61] This contention is not supported by State practice. 'For purposes of extradition, vessels on the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong: but a merchant vessel within the territorial waters of the United States is within the territory of the United States, and a subject of the nation to which such vessel belongs may be arrested on a warrant issued by an extradition magistrate in pursuance of proceedings for his extradition'.[62] Further the Home Secretary pointed out that in November,

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[59] U.S. Court of Appeals, D.C. Circuit, Doc. No. 9813, *Gerhart Eisler*, Appellant v. *U.S.A.* Appellee, *Brief for Appellee*, 1948, pp. 1–3.

[60] House of Commons, May 16, 1949 (*Hansard*, 5th series, Vol. 465, cols. 26–32).

[61] Polish Embassy, Washington, Press Release, May 18, 1949.

[62] 35 *Corpus Juris Secundum*, s. 30, p. 358, citing *Re Newman* (1897) 79 F. 622.

1938, the Poles had themselves arrested a Bolivian on a British ship in Gdynia, a right which had not been contested by His Majesty's Government, and that today the Poles search all British ships before their departure.[63] The British authorities therefore rejected the Polish protest.[64]

Before the hearing on the extradition warrant the United States altered the charge to one of making false statements, a charge which, as has already been indicated, was regarded as equivalent to perjury, and, since absolute identity of nomenclature is not essential,[65] was within the Anglo-American Extradition Treaty. Despite the rule as to non-identity it was, so far as can be ascertained from the reports,[66] completely ignored by the Bow Street magistrate. He agreed that Eisler was 'a convicted person, but the point is: is he a fugitive criminal? . . . If you merely tell a lie on oath', not connected with judicial proceedings, 'you have committed something akin to perjury. . . . The false statement alleged to have been made by Eisler was made for the purpose of departing from the United States. It seems to me that no judicial proceeding was thus contemplated. It was purely an administrative action performed by the officer in question. . . . In my opinion it is abundantly clear that in no circumstances whatever could the offence of which he was convicted in America come under the technical head of perjury in this country. In these circumstances, the United States has failed to show that Eisler has been guilty of an extradition crime, and this application fails', so that Eisler was able to become a Minister in the East German Government.

As a result of the magistrate holding that the offence was not extraditable it was unnecessary to consider whether it was a political offence or whether, as was freely alleged, the United States was motivated by political antagonism in making its application, a feeling that found expression among all parties in the House of Commons immediately upon Eisler's arrest, and led the Home Secretary to remind the House that, where political asylum is concerned, what is important 'is not what the man claims to be: it is what the facts reveal him to be'.[67] For Eisler to have pleaded that he was a political offender might well have been difficult. As has been seen, it is the offence that must be political in nature, and he was undoubtedly guilty of making false statements in applying for a permit to depart: prima facie certainly not a political offence. In extradition it is not enough that the accused is a political offender if his offence is a common crime. He would then have to prove the *mala fides* of the demanding State and, in accordance with the cases already mentioned, it is most unlikely that the English courts would have been prepared to accept such accusations against the United States. Later events provided indirect support to these insinuations, for nearly a month after Eisler had been released the United States refused Mrs. Eisler's request for an exit permit to join her husband. Instead she was detained in Ellis Island pending deportation.[68] Voluntary departure was forbidden in order to permit compulsory expulsion to take place.

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[63] House of Commons, May 19, 1949 (*Hansard,* Vol. 465, col. 594).

[64] *The Times* newspaper, June 9, 1949.

[65] See *supra,* pp. 277–278.

[66] Since the case remained in the magistrate's court it does not appear in the Law Reports, and reference must therefore be made to *The Times* newspaper, May 28, 1949.

The *Eisler Case* raises the question whether it is not time to revise the definition of political offence and to apply the test not to the act committed, but to the individual charged with committing it. Such an approach would probably solve nothing, but merely result in shifting the burden of proof from the accused, who now has to prove that his offence was political, to the demanding State which would have to prove that he was not a political offender but a common criminal. In view of the difficulty of proving a negative and the attitude towards political dissidents inherent in the cold war such a change would be even less acceptable to governments than in normal times.

So far, this paper has been concerned with cases arising under extradition treaties. It is fully compatible with State sovereignty for a State to surrender a fugitive even though no extradition treaty exists. In 1953, Westberg, a Swedish seaman charged with murdering a shipmate on a Swedish ship in English territorial waters, was handed over to Swedish police officers to stand his trial in Sweden. By the Consular Convention of 1952,[68a] the English courts would possess jurisdiction over Swedish seamen committing 'grave' offences in British waters. In accordance with section 3 of the Territorial Waters Jurisdiction Act, 1878, however, prosecutions in such circumstances can only be instituted with the Home Secretary's authorisation. In *Westberg's Case* this authorisation was refused.[68b] In 1947, Chile granted Argentina's request despite the absence of a treaty. In *Re Múñoz,*[69] reference was 'made to the principles and practices of international law, as set forth in Article 637 of the Code of Criminal Procedure. . . . According to these principles, a request may be sent to the authorities of the State in which an accused or convicted person is found provided that the crime for which extradition is sought has the character of a delict and is punishable by the laws of the two States with a minimum penalty of one year's imprisonment'. These principles are embodied in the 'Bustamante Code' and annexed to the 1928 Habana Convention on Private International Law[70] and were applied even though the Convention had not been ratified by Argentina.

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[67] May 16, 1949 (*Hansard*, Vol. 465, col. 28).
[68] *The Times* newspaper, June 23, 1949.
[68a] Cmd. 8541.

Multilateral extradition treaties are not very frequent but there was one in 1923 affecting the States of Central America,[71] and in 1937 a multilateral extradition treaty was signed by twenty-four States, both European and otherwise. In 1934, King Alexander of Yugoslavia and M. Barthou, French Foreign Minister, were assassinated. In the *Case of Pavelitch and Kvaternik*[72] Italy refused the French request for the extradition of two of the assassins, as 'the assassination, having resulted from political motives and having injured the political interests of Yugoslavia, constituted a political *delitto*'. It must therefore be distinguished from the *Fort Case*[73] in which Germany extradited the murderers of a Spanish foreign minister on the ground that it was an 'act of revenge, possibly arising out of a political motive but not committed with a view to achieving a political object'.

The 1934 assassination led to the Convention for the Prevention and Punishment of Terrorism, 1937.[74] By this the Parties reaffirmed their obligation not to encourage acts of terrorism, defined as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'. They further agreed that such crimes, if they threatened the life or liberty of Heads of States, their heirs or spouses, and persons charged with public functions or holding public positions, should be read into the various lists of extraditable offences covered by extradition treaties, although the obligation was to 'be subject to any conditions and limitations recognised by the law or the practice of the country to which application is made'. This Convention, however, remains without a single ratification.

[68b] My thanks are due to Mr. Mallenborg, Swedish Consul-General, for permitting me to use information conveyed in a private letter. See also, *The Times* newspaper, January 7, 1953.

[69] (1947) *Annual Digest,* p. 137.

[70] Hudson, 4 *International Legislation,* p. 2279, Code, Book 4, Title 3, Articles 353–354, p. 2331.

[71] 2 *ibid.,* p. 954.

[72] (1934) 76 *Monitore del Tribunali* (1935), p. 39.

[73] (1921) Mettgenberg, *Auslieferungsfall Fort,* 12 *Zeitschrift für Völkerrecht,* 1923, p. 300.

WAR CRIMINALS

Multilateral agreements concerning extradition became more common as a result of the war crimes committed in the Second World War, many of which, especially those concerning aggressive war, were essentially political in character. During the war the United Nations had made it clear that they were opposed to war criminals and those persons who 'had actively assisted a State at war with their own country' from seeking asylum in neutral or belligerent States, even though the offences might have been political.[75] In 1946 the General Assembly of the United Nations passed a Resolution *recommending* Members and *calling upon* non-Members to return war criminals,[76] understood in the sense of including quislings and traitors. This wide definition of war criminals led to difficulties regarding the treatment of refugees, for eastern European governments maintained that all who refused to return home were either war criminals or traitors.

By 1947 no neutral government had surrendered anybody who had been asked for,[77] although in 1945 Spain expelled Laval and Switzerland Edda Ciano.[78] Italy, however, while a co-belligerent, refused to surrender General Roatta to Yugoslavia and elected to try him in Italy.[79] On the other hand, although 'in principle the British are opposed to the handing over of Germans to Powers of the eastern bloc', the British authorities in Germany in 1950 handed over Haase to Poland as 'the documentary and other evidence submitted to the extradition tribunal was held to be of such a character that there was no option but to agree'.[80] A month later, the American authorities handed three Germans, against whom there was prima facie evidence, to France.[81] In 1953, however, France complained that 'since 1950 the British authorities in Germany had refused all requests for war criminals to be handed over'. These refusals were based on an order of the British Military Governor in Germany that, after September 1, 1948, surrender would be granted 'only in the case of a person against whom a clear prima facie case of murder, as defined by the German penal code, was made out'.[81a] At about the same time difficulties arose between the Netherlands and Germany concerning the return of war criminals who had escaped to Germany from a Dutch prison. There was some suggestion that by the German Basic Law they could not be extradited as they were 'politically prosecuted' persons, who, moreover, possessed German nationality.[81b]

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[74] Hudson, 7 *International Legislation*, p. 862.

[75] *History of the United Nations War Crimes Commission*, H.M.S.O. (1948), Chap. 13, *Arrangements for the Surrender of War Criminals.*

[76] U.N.Doc. A/64, *Resolutions adopted by the General Assembly at the First Part of its First Session* (1946), p. 9.

[77] *Op. cit.*, n. 75 above, p. 431.

[78] Neumann, *loc. cit.*, n. 45 above, p. 505.

At least one member of the United Nations has refused to surrender a fugitive condemned by another for collaboration with the enemy. In 1947 Brazil refused a Danish request on the ground that 'the crime of assisting the enemy in time of war is a political one *lato sensu* because it is a crime against the State in its supreme function, namely its external defence and sovereignty'.[82] Belgium and France dealt with the same sort of problem by an exchange of notes in December, 1946, and January, 1947, supplementing the Extradition Treaty of 1874,[83] and in *Re Colman*[84] the Court of Appeal of Paris held that the notes had extended the Treaty rendering 'crimes or delicts against the internal [*sic*] safety of the State committed during war against a common enemy' common and not political offences.

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[79] *Ibid.*, p. 507.

[80] *The Times* newspaper, October 30, 1950.

[81] *Ibid.*, November 4, 1950.

[81a] *Ibid.*, January 31, 1953.

[81b] *Ibid.*, January 12, 1953.

[82] *Denmark (Collaboration with the Enemy) Case* (1947) *Annual Digest*, 1947, p. 146.

[83] Martins, 1 *Nouveau Recuel Général* (2nd series), p. 140.

[84] (1947) [1947] *Annual Digest*, p. 139.

Provision for the extradition of war criminals has been carried further by the Geneva Conventions of 1949. Under them each High Contracting Party has undertaken to try grave breaches, although it 'may, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'.[85]

THE CONTINUITY OF EXTRADITION ARRANGEMENTS

In peace treaties it is common for the victor to include a provision permitting the revival of pre-war treaties by notification to the vanquished. In accordance with the Italian Peace Treaty, 1947,[86] the United States revived the Extradition Treaty, 1868,[87] and its operation was considered in *Ex p. LoDolce*.[88] In 1944 while on a mission in Northern Italy, then still occupied by the Germans, LoDolce, a United States soldier, murdered the leader of the mission. After his demobilisation and the revival of the Treaty Italy applied for his surrender. The Court held that the operation of the Treaty was excluded by the fact that at the time of the offence 'enemy armies were within [Italy's] boundaries, . . . and such presence may justly be considered as an act of hostility and certain of Italy's rights were given up, ceded, severed or abandoned by that sovereign for the time'. Holding himself bound by the decision of the Supreme Court in *Coleman* v. *Tennessee*,[89] the judge dismissed the application, for 'when the armies of the United States were in the enemy's country, the military tribunals had, under the laws of war, . . . exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service'.

The fate of an extradition treaty is often in question when a State changes its constitutional framework so fundamentally as to suggest that a new entity has been created. In *Terlinden* v. *Ames*[90] the United States Supreme Court held that the Extradition Treaty with Prussia of 1852, which had been extended in 1862 to the North German Confederation, was not terminated by the constitutional changes of 1871 by which the King of Prussia became the Emperor of Germany with power to fulfil international obligations, for 'we do not find in the constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in this regard. . . . [Further,] during the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has been repeatedly recognised by both governments as in force'.

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[85] Cmd. 8033 (1950): *Wounded and Sick in the Field,* Art. 49; *Wounded, Sick and Shipwrecked Mariners at Sea,* Art. 50; *Prisoners of War,* Art. 129; *Civilians,* Art. 146.

[86] Cmd. 7022 (1947), Art. 44.

[87] Malloy, 1 *op. cit.*, p. 966.

[88] (1952) U.S. District Court, Western District, N.Y., Misc.Crim. 20. My thanks are due to Miss May C. Sickmon, Clerk of the Court, who supplied me with a photostat copy of the judgment.

[89] (1878) 97 U.S. 509, at p. 515.

This decision must be carefully distinguished from that in *Artukovic* v. *Boyle*.[91] Yugoslavia applied to the United States for the surrender of Arkutovic an alleged war criminal, but in a note dated May, 1951, the State Department suggested that Yugoslavia proceed by way of extradition on the ground that the Extradition Treaty with Serbia of 1902[92] was regarded as still being in force. Judge Hall pointed out that although treaties are made by the Executive, when made they become law, and 'the power to determine whether a law exists and to interpret it is a judicial power . . . and does not lodge in the *ipse dixit* of the Executive Department'. After a careful consideration of the historical circumstances attending the birth of Yugoslavia after 1918, and a comparison of the 1902 Treaty with that in *Terlinden* v. *Ames* Judge Hall concluded that Yugoslavia was an entirely new creation and the treaty was one that terminated with Serbia and so never applied to Yugoslavia. In fact there was no evidence of it ever having been applied between 1902 and the instant case. As there was legally no treaty the Executive statement was of no effect. Yugoslavia has protested at this decision,[93] and an appeal is pending.

A case which involved a similar executive statement was

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[90] (1902) 184 U.S. 270, at p. 285.

[91] (1952) *Los Angeles Daily Journal*, July 18, 1952. My thanks are due to Judge Hall, Southern District of California, Central Division, for sending me a copy of his judgment.

[92] Judgment, n. 2.

[93] *Tanjug*, No. 77 (Yugoslav Embassy, London), July 18, 1952.

Re Westerling,[94] in which the judge had occasion to remark that the 1900 Treaty between the United Kingdom and Serbia[95] still operated with Yugoslavia. In the case the Attorney-General stated, on the authority of the Foreign Office, that 'the Republic of the United States of Indonesia has succeeded to the rights and obligations of the Kingdom of the Netherlands under the Anglo-Netherland Treaty of 1898[96] in respect of Indonesia and that the said Treaty now applies between His Majesty's Government and the Republic of the United States of Indonesia'. Evans, J., however, refused to apply the Treaty as there had been no Order in Council extending the Extradition Treaty specifically to Indonesia. That which had followed the 1898 Treaty applied to the area merely as a Dutch colony, and stated expressly that it should 'apply in the case of the Netherlands and with the Queen of the Netherlands', and was therefore still capable of application. 'The State in the case of which the Act is applied thereby is the Netherlands and no other. It is not in the case of the Republic of Indonesia, nor in that of the Netherlands and its successors. . . . To treat the Act as applied to a State whose name has never appeared in any Order laid before Parliament would . . . be abuse of the power of applying the statute'.[97] Indonesia later applied to the Netherlands for Westerling's extradition in accordance with the understanding that the former *inter se* rendition arrangements would continue. The Dutch High Court refused the request because of Westerling's Dutch nationality.[98]

Another case which concerned the elevation to statehood of a former dependency was *Shehadeh* v. *Commissioner of Prisons*.[99] The Republic of Lebanon applied for extradition under the Provisional Agreement for the Extradition of Offenders between Syria and Lebanon and Palestine, 1921. FitzGerald, C.J., wrongly it is submitted, regarded the transition from mandate to independence as a mere change in the form of government, and 'the important question is whether legal sovereignty to enable it to enter into treaty negotiations was vested in the previous State.

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[94] (1951) 17 M.L.J. (*Malayan Law Journal*) 38.

[95] Piggott, *op. cit.*, p. 217.

[96] *Ibid.*, p. 156.

[97] At pp. 43–44.

[98] (1952) *Netherlands News* (Netherlands Embassy, London), November 5, 1952.

[99] (1947) 14 P.L.R. 461 (*Annual Digest*, 1947, p. 42).

It cannot be doubted that the sovereignty, in so far as it affected treaty-making power, vested in the French Republic in the case of the Lebanon and the Mandatory in the case of Palestine. . . . That treaty, unless it is abrogated, binds the successor Government. It is, therefore, still effective between the Lebanese Republic and Palestine'.

Within the British Commonwealth there have been numerous developments since 1945. Some cases concerning Ireland are of interest. *Ex p. Nalder*[1] decided just prior to the passing of the Ireland Act, 1949,[2] showed that despite the establishment of the Irish Free State in 1922, the Petty Sessions (Ireland) Act, 1851,[3] still operated, to give effect to an Irish warrant in this country. After the Ireland Act had come into force the Supreme Court in Dublin held the 1851 Act to be still binding and, in *Ex p. Duggan,*[4] gave effect to a warrant issued in England. As if to return the compliment, in June, 1952, Benjamin Davidson was arrested on his release from prison in London after serving a sentence for illegally importing a car, and was returned to Ireland and sentenced there for illegally exporting it.[5]

In the field of rendition, too, continuity applies. In *Mubarak Ali's Case*[6] the problem involved the continued operation of the Fugitive Offenders Act so far as the Republic of India was concerned. Lord Goddard, C.J., held that the Act is still in force, for 'the India (Consequential Provisions) Act, 1949,[7] . . . preserves in force all the laws of this country relating to India which were in force at the date of the republic coming into existence'.

In India itself the situation has taken a somewhat different turn. In the days of British rule no treaties were necessary between the various provinces although rendition between them was governed by the Indian Extradition Act, 1903.[8] Between British India and the Native States treaties were necessary, and in 1869[9] such a treaty was entered into between Great Britain

[1] [1948] 1 K.B. 251.
[2] 12 & 13 Geo. 6, c. 41.
[3] 14 & 15 Vict., c. 93.
[4] *The Times* newspaper, November 8, 1950.
[5] *Ibid.,* June 10, 1952.
[6] *Loc. cit.,* n. 58 above, at p. 1062.
[7] 12, 13 & 14 Geo. 6, c. 92.
[8] Act XV of 1903.
[9] 3 Aitchison, *A Collection of Treaties, etc., Relating to India* (5th ed.), 1932, p. 247.

and Tonk. *Saksena* v. *The State*[10] was concerned with the effect of the new constitutional situation on the extradition arrangements between India and Tonk. The question was how far the treaty was affected by 'the merger of the State into the United States of Rajasthan. . . . Here there was no absorption of one State by another. Several States voluntarily integrated their territories so as to form a larger and composite State of which every one of the Covenanting parties was a component part. . . . It may not be said the Covenanting States lost their personality altogether and for [certain] purposes the Covenant of Merger recognises a quasi-separation between the territories of the different States, but there is no [longer any] such thing as [a] subject of the Tonk State. . . . In the altered circumstances the Extradition Treaty of 1869 has become entirely incapable of execution. The Tonk State no longer has any independent authority or sovereign rights'—the English courts, and the Government of Pakistan, on the other hand, regard Bahawalpur as an independent sovereign State despite its accession to the Federation of Pakistan,[11] although the Government of Pakistan refuses to recognise Junagadh, which has also acceded to the Federation, as an independent sovereign State[12]—'and can neither demand nor make extradition. It cannot be said that the sovereignty of the Tonk State in this respect is now vested in the United State of Rajasthan. The authority, so far as extradition was concerned, was already surrendered by the Tonk State in favour of the Dominion Government by the Instrument of Accession. The treaty cannot but be regarded as void', and the ordinary law of extradition therefore applied. The practical importance of this decision lies in the fact that the appellant was wanted for offences which were extraditable under the 1903 Act, but not under the Treaty.

It would appear from the above that, although there are inconsistencies in recent judicial practice in the field of continuity, there is a tendency for extradition arrangements to continue to operate despite changes in State personality. This is as it should be, for it would be completely out of keeping with the supremacy of the rule of law that such changes should cause a

[10] A.I.R. (37) 1950 Supreme Court 155, at p. 161, *per* Mukherjea, J.

[11] *Sayce* v. *Ameer of Bahawalpur* [1952] 1 All E.R. 326; 2 All E.R. 64.

[12] *Begum of Junagadh* v. *The Crown* (1952), Pakistan Federal Court, Criminal Appeal No. 7 of 1952.

hiatus in judicial enforcement. To make the position quite clear the parties would be well advised to make an explicit affirmation or renunciation of the treaty as soon as possible. Apart from this question, it is submitted that the recent cases show that even in the field of political offences the present arrangements concerning the law of extradition work satisfactorily, and that there is no real need, save in exceptional circumstances like those relating to war criminals, to replace the system of bilateral arrangements by multilateral treaties.

15

THE BONN AND PARIS AGREEMENTS

GEORG SCHWARZENBERGER

AMONG political treaties of the post-1945 era, the Bonn and Paris Agreements rank in importance with the North Atlantic Pact and the Peace Treaty with Japan.[1] They are a consistent extension of the principles of the North Atlantic Alliance to a recruit considered as ineligible for membership of NATO[2] and they fall but little short of a separate peace treaty with the Federal German Republic.

I. OBJECTS

The purposes of the Bonn and Paris Agreements may be conveniently divided into long and short term objectives.

The ultimate purposes are three distant goals: peaceful unification of Germany, a peaceful and prosperous European community of nations, and a developing Atlantic Community, comprising the European Community and, within its folds, a unified Germany.

(1) *The Peaceful Unification of Germany.* The English text and, with one single variation, the French text speak of the achievement of a unified Germany and of the unification of Germany.[3] The German text, however, refers just as con-

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[1] Cf. Sir Eric Beckett, *The North Atlantic Treaty,* 1950; *The North Atlantic Pact,* 3 *World Affairs* (1949), p. 236 *et seq.,* and L. C. Green, *Making Peace with Japan,* 6 *Year Book of World Affairs* (1952), p. 1 *et seq.*

[2] See below, pp. 303 and 313.

[3] Cf. the General Treaty (Cmd. 8571—1952):—

	English text	*French text*	*German text*
(a) *Para. 3 of Preamble*	'achievement of a fully free and unified Germany through peaceful means'	*'l'établissement . . . d'une Allemagne . . . unifiée'*	*'Wiederherstellung'* (re-establishment) etc.
(b) *Para. 7 of Preamble*	'their common aim for a unified Germany'	*'une Allemagne unifiée'*	*'ihres gemeinsamen Strebens nach einem wiedervereinigten Deutschland'* (re-united Germany)

sistently to the *re*-establishment of a unified Germany and the *re*-unification of Germany.

It is clear that, in whichever language the original text has been drafted, the translation introduces a significant change in emphasis. The future unification of separate entities is one thing. Reunification, however, implies restoration of a *status quo* and, thus, introduces as an imponderable a moral right to claim this object.[4]

It is possible that this discrepancy gives expression to an agreement under the counter to enable every one concerned to get away at home with a ticklish issue on the line of least resistance. If so, it would not be the first time that apparent agreement hid actual disagreement. What would be novel would be merely the form chosen for expressing an agreement to disagree.

If such a scheming design on the higher levels of the four delegations were to be dismissed as inconceivable, then responsibility for this discrepancy must rest with those entrusted with the collation of the treaty texts.

Whatever the explanation of the mystery may be—and it is not difficult to guess—it is practically impossible[5] at this stage

	English text	*French text*	*German text*
(c) Art. 7 (2)	'their common aim of a unified Germany enjoying a liberal-democratic constitution'	'*une Allemagne unifiée*'	'*ihr gemeinsamen Ziel: ein wiedervereinigtes Deutschland*' etc.
(d) Art. 7 (3).	The same discrepancy between the English and French texts, on the one hand, and the German text, on the other, appears *three* times in *one* sentence.		
(e) Art. 10 (a)	'in the event of the unification of Germany'	'*en cas de rétablissement de l'unité de l'Allemagne*'	'*im Falle der Wiedervereinigung von Deutschland*' (re-union of Germany)

[4] In this connection it should be mentioned that the definition of the frontiers of Germany as they existed on December 31, 1937, in Article II (d) of Proclamation No. 1 of the Control Council still applies to the Federal Republic (cf. the exchange of letters between the Three Foreign Ministers and the Federal Chancellor, May 26, 1952—Cmd. 8571, p. 143). This reservation does not, however, establish any right of the Federal Republic to insist on the re-establishment of this particular *status quo*. On the international level, it is *res inter alios acta*. On the position in relation to Germany, cf. Art. 7 (1) of the General Treaty.

[5] The French demands for additional interpretative protocols may perhaps present an opportunity to reopen the question of this discrepancy between the texts. See also below, p. 305.

to undo its consequences. Since the Treaties have been signed, the choice before each Contracting Party is either total rejection or total acceptance by way of ratification. Once the Treaties have been ratified, this discrepancy will be governed by the principle of the equal authenticity of each of the three texts[6] and, in case of dispute, the matter will ultimately have to be referred to the Arbitration Tribunal under the General Treaty.

To be fair, it should be emphasised that not too much harm is likely to result from this oversight if this should be the correct explanation. Whether the words used are *unification* or *reunification,* it is made abundantly clear in every one of the Articles of the General Treaty that such unity is to be attained by peaceful means alone, and peaceful procedure requires the consent of every one concerned. Moreover, the result of such peaceful change is to be a 'unified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic'.[7] To attain this object short of war is about as likely as to create a unified Germany on the pattern of a People's Republic. In a bipolarised world either solution could only be imagined as the result of either a lost war or a diplomatic defeat equivalent to it.[8]

(2) *The European Community.* In a British Note to the Soviet Union, delivered a fortnight before the signature of the Bonn Treaties, the issue of the unification of Germany was specifically related to a wider question: 'Germany is divided because Europe is divided'.[9] Yet, it would be just as true to say that Europe is divided because the world is divided. This, inevitably, brings us back to the fundamental fact that the international frontier between East and West runs right through Germany and Europe. Thus, however regrettable this may be, the unification both of Germany and of Europe must remain long range objectives in a highly literal sense.

In these circumstances, it would be idle to inquire what the Contracting Powers meant by a European Community. Its ultimate Eastern frontiers are as undetermined as its constitutional structure or ideological contents.[10]

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[6] Cmd. 8571 (1952), p. 8.

[7] Art. 7 (2) of the General Treaty.

[8] See further the present writer's *Power Politics,* 1951, p. 381 *et seq.*

[9] Cmd. 8551 (1952), p. 5.

[10] Cf., for instance, Para. 1 (c) of Art. 38 of the Treaty on the European Defence Community (abbreviated in future to E.D. Treaty) in *Die Vertragswerke von Bonn und Paris,* 1952.

(3) *The Atlantic Community.* Similarly, the recognition of the existence of a developing Atlantic community and the proposed acceptance under its wings of both the European Community and a unified Germany should not be pressed too hard. A triple possibility is something which it is as hard to analyse in terms of politics as of law. At the most, the articulate formulation of this objective shows a laudable awareness in official quarters of the most serious deficiency of the North Atlantic Treaty Organisation: its lack of emotional appeal.[11] To imply, however, that more than such a vague response to a dimly felt existing demand was in the minds of the Contracting Parties or that they shared any common views on this still highly fluid topic[12] would be to commit the cardinal sin of treaty interpretation: to read one's own desires into the expressed or implied intentions of the Contracting Parties.

We must now turn to the two immediate purposes of the Bonn and Paris Treaties: irrevocable integration of the German Federal Republic into the Western World and adequate provision for the defence of Western Europe, with active German participation but without a purely national West German army.

These short-term objectives are the crux of the matter. They could not be treated in terms of non-committal generalities. If they were to be successfully tackled, a number of concrete problems obstructing their attainment had to be faced in terms of never ideal realities.

2. PROBLEMS

Each of these short term objectives posed a number of awkward and complex questions for the negotiators.

(1) *Integration of the Federal Republic into the Western World.* On all sides, the desirability of a permanent association of the Federal Republic with the Western World had come to be taken for granted. If it was to be a free and voluntary association, it had to be on a footing of equality. As far back as 1926, however, an Imperial Conference had found it wise to qualify its definition of equality of status by the rider that this did not universally extend to function, and that here some-

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[11] Cf. the Report of the Royal Institute of International Affairs on *Atlantic Alliance*, 1952.

[12] See, for instance, S. Strange, *The Atlantic Idea* (7 *Year Book of World Affairs*, 1953, p. 1 *et seq.*) and *loc. cit.* in note 8 above, p. 804 *et seq.*

thing more than immutable dogmas were required.[13] In particular, the vulnerable strategic situation of Western Germany as part of the Eastern European marches of the Western World had to be borne in mind. Moreover, German and Allied insistence alike—though for different reasons[14]—on the legal continuity between Hitlerite Germany and the German Federal Republic served as a constant reminder of the possibility of a more significant and more sinister continuity beneath the deceptive façade of democracy *à la* Bonn. The problem was how to effect this integration.

A general peace treaty was out of the question. The tedious experiences of the negotiations for the Austrian Treaty might have been repeated. In fact, to aim at a general peace treaty would have meant the continuation of the occupation status of Western Germany for an indefinite period. If, however, both sides meant what they said, the peace conference would have quickly and, in a pre-war atmosphere, necessarily degenerated into an undignified scramble for the favours of a once vanquished enemy.

A separate peace treaty between the Western Powers and the Federal Republic would have raised other difficulties. It might have been just possible to square it with the text of the United Nations Declaration of January 1, 1942. There was no denying, however, that it would have been incompatible with the Anglo-Soviet and Franco-Soviet Treaties of Alliance. According to the official views held in London (and Paris) as well as in Moscow, these treaties have been constantly broken by the other treaty partner but, none the less, are still in force.[15]

In any case, it was feared in Western capitals that any such step might induce the Soviet Union to denounce the Potsdam Agreement and related earlier arrangements on which the status of West Berlin and of the Western forces in Berlin was thought to depend.[16]

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[13] Summary of Proceedings of the Imperial Conference of 1926 (Cmd. 2768).

[14] See further below, p. 302.

[15] For a different view, see *The Impact of the East-West Rift on International Law,* 36 *Transactions of the Grotius Society* (1950), p. 240, and *loc. cit.* in note 8 above, pp. 525–527.

[16] Cf. W. Abendroth, *Die gegenwärtige völkerrechtliche Bedeutung des Potsdamer Abkommens* (7 *Europa Archiv,* 1952, p. 4943 *et seq.*). In his extremely interesting paper, Professor Abendroth appears to ignore one essential aspect of the matter. Admittedly, the protestations of States on

These misgivings were shared in Bonn. After considerable vacillation on this matter, the legal advisers of the Federal Government discovered blessings in disguise in the Potsdam Agreement. While, as *res inter alia acta,* it did not commit the Federal Republic, Western Germany could indirectly derive great benefits from it: for the Potsdam Agreement is the only international document in which, beyond doubt, the Soviet Union had accepted the provisional character of the Oder-Neisse line. Moreover, a separate peace treaty would have given too definite a character to the Federal Republic which likes to imagine itself as a *provisorium* so as not to prejudice its all-German aspirations.

With the exception of France, the Western Powers had deprived themselves of the simplest and cleanest way out of the impasse: to take advantage of the *de facto* and *de jure* break between Hitlerite Germany and the brand new regime established by the Occupying Powers in 1945, when they assumed supreme authority with respect to Germany. In this view, no peace treaty was required; for the Federal Republic was not the former enemy of the Western Powers. For different tactical reasons of their own, both the Anglo-Saxon Powers and the Bonn Government discouraged this interpretation.[17] The Anglo-Saxon Powers thought in terms of financial responsibility for German pre-war loans, and of the ease with which the Federal Republic could be made to step into the shoes of pre-1939 Germany as a party to a number of important multilateral treaties. The Bonn Government felt that the admission of legal continuity with the

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the continued validity of the Agreement must be taken into consideration. A point can be reached, however—and, in this case, appears to have been reached—when both sides are estopped from alleging the binding character of an Agreement because to do so would be contrary to the principle of *venire contra factum proprium.* Cf. also Mr. Eden's statement in the House of Commons, July 31, 1952 (*Hansard,* Vol. 504, cols. 1707–1708) and the United Kingdom Note to the Soviet Union, September 23, 1952 (*The Times,* September 24, 1952).

A more probable reason why the Soviet Union respects the Western position in Berlin appears to be that her leaders are aware of the consequences of turning the screw there too far. It would simply be a *casus belli.* See further *loc. cit.* in note 15 above, 1950, p. 247, and *loc. cit.* in note 8 above, p. 396.

[17] R. Stoedter's *Deutschlands Rechtslage,* 1948, contains the best summary of the earlier discussions on this point which were also bedevilled by German hopes of forcing the occupation powers into the straitjacket of the Hague Regulations on Land Warfare. See further the present writer's *International Law,* Vol. 1, 1949, pp. 142 and 310 *et seq.*

Third *Reich* was a small price to pay for all the claims which, in future, might be based on lawful descent from such dubious ancestry.

Thus, indefinite continuation of the Occupation Statute, general and separate peace treaties, and admission of a break in German legal continuity were all equally unacceptable. The solution chosen had to do justice to German demands for equality of status, to make palatable the continued maintenance of the Western forces in the territory of the Federal Republic and to leave unaffected the legal position of the Western Powers *vis-à-vis* the Soviet Union.

(2) *The Defence Problem.* The integration of the Federal Republic into the Western World was in itself a major headache. It was not, however, an end in itself.

So far, the defence of Western Europe rested in fact on the shoulders of the Allied occupation forces. To prevent Western Europe from having to be 'liberated' another time, these forces had either to be increased manifold or German manpower and industry had to be geared to the paper schemes hatched at NATO headquarters.

After showing considerable patience over a prolonged period, the Americans made it painfully clear that, so far as they were concerned, a national Western German army was perhaps not the ideal, but certainly a practical solution of an urgent problem.

Having suffered three German invasions since 1870, the very idea of another German army was anathema in France. Neither could it evoke enthusiasm among the European members of NATO, overrun and occupied by the legal predecessors (as they were constantly told[18]) of the Federal Republic.

The historical advisers of the Western Delegations may also have lectured their chiefs on relevant precedents: the self-neutralisation of the Prussian Corps *York* during the Franco-Russian struggle in 1812; the defection of some of the German contingents from Napoleon's coalition army in the closing phase of the Battle of Leipzig in 1813, and the cordial co-operation between the *Reichswehr* and the Red Army during the Weimar Republic.

Once a purely national German army was ruled out, difficulties arose over the membership of the Federal Republic in

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[18] See p. 302, above.

NATO, based as this Organisation is on national contingents. Yet to leave Western Germany outside the North Atlantic Treaty Organisation, while others, and especially Italy, were members, was hardly compatible with the newly established principle of equality between the former enemies.

The task in hand was to find speedy, practical and constructive answers to these baffling issues.

3. WAYS AND MEANS

Pure lawyers may be impatient over the emphasis put so far in this paper on 'political' issues. In a *political* treaty, however, these are the essence of the matter. Law is merely the outward and technical form of the political decisions that have been taken and are embodied in these documents. Only if these problems are set out in their proper perspective does it become possible to assess critically the adequacy of the legal techniques and of the institutional devices chosen to serve their appointed purposes.[19]

At this stage, the fate of the Bonn and Paris Agreements still hangs in the balance. It, therefore, appears advisable to concentrate on the ways and means adopted to attain the main objectives of these treaties and to solve the major problems with which the negotiators were faced. Technically fascinating, but at present somewhat hypothetical secondary questions may be adjourned until after ratification—should this propitious event ever take place.

(1) *Integration of the Federal Republic into the Western World.* The problem was firmly attacked from four different angles. Equality of status was conceded to the Federal Republic in a variety of ways. In the common interest of Western defence, the Three Powers reserved to themselves wide powers of an exceptional character. Pains were taken to safeguard their legal rights in relation to the Soviet Union, and the inseparable connection between the two immediate objectives of the treaties was emphasised by a battery of *junctim* clauses.

(a) *Equality of Status.* It is stipulated in Article 1 of the General Treaty that 'the Federal Republic *shall* have full authority over its internal and external affairs, except as provided in the present Convention'.

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[19] See further *loc. cit.* in note 15 above, 1950, pp. 229–230.

Again, a discrepancy between the English text, on the one hand, and the French and German texts on the other, exists. In the French and German text, instead of the imperative or future tense, the present tense is used. Logically this is preferable; for a draftsman should project his text into the future and use the tenses which will be appropriate when the draft treaty comes into operation. On this assumption the English version expresses less elegantly the intentions of the Contracting Parties.

The English text reveals, however, more clearly what, at the time of drafting, was in the minds of those who, until these Agreements come into force, still exercise their *condominium* over the Federal Republic: for the time being, Western Germany has not yet attained full authority over her internal and external affairs. The Three Powers intend, however, to transfer most of these powers to the Federal Republic. It is understandable that the German negotiators neither approved of this mode of thought nor wished to see it expressed.[20] Yet, again, were the other Contracting Powers aware of this discrepancy?

Does the reservation: 'except as provided' take back with one hand what has been given with the other? It is true that what, in fact, will happen is that, on ratification, the by then former Occupation Powers will retain some of their former powers. In law, however, the position is different, at least in the relations between the Contracting Parties. As distinct from the position of the Three Powers *vis-à-vis* the Soviet Union, in relation to which they still claim to exercise their share of the *condominium* over Germany,[21] the Western Powers have consented to put the exercise of their reserved powers on a new footing *vis-à-vis* the Federal Republic. They will enjoy special rights because—and only because—they have undertaken special responsibilities. So long as these have to be carried out—and only for the reasons stated in the General Treaty[22]—the Western Powers will be entitled to their special rights. Once these circumstances cease to exist the Western Powers are under a binding *pactum de contrahendo* to hand over these reserved powers to the Federal Republic.[23]

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[20] Other instances of the underlying principle of transfer of powers by their former holders to the Federal Republic are Art. 2 (1) of the General Treaty ('retain') and Articles 1–3 and 6 of Chapter 1 of the Transitional Treaty (Cmd. 8571, p. 75 *et seq.*).

[21] See below, p. 310.

[22] See below, p. 309.

Over and above Article 1 of the General Treaty, it is expressly declared in a number of places that the Contracting Parties have established 'new relations'[24] with each other and that these will be conducted through ambassadors[25] on a footing of equality[26] and non-discrimination.[27]

More convincing than general protestations is the fact that the Western Powers have shown their resolve to practise the principle of equality by granting complete reciprocity to the Federal Republic in all non-reserved subjects, including the right to initiate revision proceedings.[28]

Beyond this, even the ghosts of *de facto* inequality and of potential pressure being exercised by the foreign forces situated in the Federal Republic have been exorcised by comprehensive systems of arbitration both under the General Treaty and the related Conventions and under the Paris Agreement. The Arbitration Tribunal under the General Treaty consists of nine members: three appointed by the Governments of the Three Powers, three more by the Federal Government, and three 'neutral' members—styled so in the Treaty with the implication of a somewhat irreverent argument *a contrario* regarding the other members. The neutral members are to be selected by agreement between the Contracting Parties and, in default of such agreement, by the President of the International Court of Justice.[29]

If neutrality is measured in terms of past enmities, the Federal Republic is less strongly represented in the chief judicial organ of the European Defence Community. This is identical with the Court of the European Coal and Steel Community. As this is constituted at present,[30] judges are chosen irrespective of their nationality. In fact, however, one of the judges is always likely to be of German nationality and one or, at the most, two places are available for 'neutral' judges in the meaning of the General Treaty.

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[23] See below, p. 309.

[24] Exchange of Letters, May 26, 1952 (*l.c.* in note 20 above, p. 143).

[25] Art. 1 (3) of the General Treaty. Since it has become the habit of exchanging Ambassadors with, and between, small States, this Article is of significance only in that it gives additional expression to the *de jure* recognition of the Federal Republic as a sovereign State and puts joint action of the Ambassadors of the Three Powers in matters of common concern on a routine basis.

[26] Para. 2 of the Preamble of the General Treaty.

[27] Para. 5 of the Preamble and Art. 6 of E.D.T. and Art. 3 (3) of the Finance Convention. Cf. also Art. 11 of Chapter 10 of the Transitional Treaty.

[28] Art. 10 of the General Treaty; Art. 51 of the Forces Treaty; Art. 16 of the Finance Convention.

[29] The members of the Arbitral Commission on Property, Rights and Interests in Germany are selected in the same manner (Art. 3 of the Annex to the Transitional Treaty).

(b) *Reserved Powers and Special Rights.* The Three Powers had ungrudgingly conceded equality of status to the Federal Republic. Her Government, in turn, was content to accept exceptionally wide inroads on her freedom of jurisdiction in matters normally considered domestic.

By these are not meant the necessarily wide terms of the Forces and Finance Conventions. Far-reaching immunities of foreign forces in the territories of friendly States in a state of cold war have become part of the routine life of most European countries, including the United Kingdom. In this respect, the duties of the Federal Republic exceed those of NATO countries in degree, but not in kind.[31]

The rights retained by the Three Powers and calling for discussion are of a different calibre and consist of a series of practically uncontrolled powers of a purely discretionary character.

Thus, the Three Powers retain the right to station armed forces in the Federal Republic and to decide on the strength of these units. 'In so far as the military situation permits' they must consult with the Federal Republic.[32]

Moreover, in certain contingencies, the Three Powers may (after fullest consultation with the Federal Republic) 'proclaim a state of emergency in the whole or any part of the Federal Republic'.[33] This only applies if, in their opinion, the security of their forces is endangered. Such a situation is deemed to

[30] Art. 32 of the Treaty on the European Coal and Steel Community. See further H.-J. Schlochauer, *Die Gerichtsbarkeit der Europaeischen Gemeinschaft für Kohle und Stahl* (3 *Archiv der Völkerrechts*, 1952, p. 389) and L. C. Green, *Legal Aspects of the Schuman Plan,* this *Annual,* Vol. 5 (1952), pp. 283–284.

[31] Cmd. 8571 (1952), p. 17 *et seq.*
As the Parliamentary Under-Secretary of State for Foreign Affairs explained in the House of Lords the reasons for the more far-reaching immunities were the size and forward position of the forces concerned (July 31, 1952—*Hansard* (House of Lords), Vol. 178, col. 513).

[32] Arts. 2 (1) and 4 of the General Treaty.

[33] *Ibid.,* Art. 5 (2).

arise if the Federal Republic and the European Defence Community are unable to deal with an attack on the Federal Republic or Berlin; a grave threat of subversion of the liberal-democratic basic order; a serious disturbance of public order in Western Germany or a 'grave threat of any of these events'. When this occurs the Three Powers 'may take such measures as are necessary to maintain or restore order and to ensure the security of (their) forces'.[34]

All these reserved rights are outside the jurisdiction of the Arbitration Tribunal under the General Treaty.[35] Only in the case of the declaration of an emergency has the Federal Republic a limited right of appeal to the NATO Council. This raises a number of interesting points. The North Atlantic Treaty does not contain any rules regarding voting in the Council.[36] Moreover, it is a merely advisory body. It may, however, be assumed that if ever the Council's jurisdiction should be invoked in this highly hypothetical case, these difficulties could be settled on the analogy of the conclusions reached by the Permanent Court of International Justice in the *Mosul Case* (1925).[37]

Finally, the Federal Government admits that the Federal Republic is in a strategically exposed position.[38] This will automatically subject her to the reservation in Article 107 of the European Defence Treaty that, subject to a unanimous decision of the Council of the European Defence Organisation to the contrary, the Commissariat may not grant permission for the manufacture of the most 'advanced' types of weapons in Western Germany.[39]

In the light of the distinction elaborated by the Permanent Court of International Justice in the *Wimbledon Case* (1923) between limitations of sovereignty impairing the status of a sovereign State and limitations of the exercise of sovereignty

[34] *Ibid.*, Art. 5 (3).

[35] *Ibid.*, Art. 9 (3). Cf. also Art. 11 of the Charter of the Arbitration Tribunal on the differences between the non-execution of a judgment of the Tribunal inside the Federal Republic and elsewhere.

[36] Art. 9.

[37] Series B, No. 12. See further *loc. cit.* in note 17 above, 1949, pp. 522–523, 536–537 and 541–543.

[38] Exchange of Letters, May 7, 1952 (*loc. cit.* in note 10 above, p. 339 *et seq.*). Cf. also *ibid.* on additional German obligations regarding the control of atomic energy and of materials required for the production of atomic weapons.

[39] These include atomic, chemical and biological weapons and directed missiles.

which do not have this effect,[40] none of these obligations and self-denying ordinances is incompatible with the grant of sovereignty to the Federal Republic. Each of them is merely a limitation of the exercise of sovereignty and, as such, evidence of the sovereign status of the entity passively concerned.

If this were all, the formalism of this argument could hardly hide the fact that, in all but name, the Federal Republic will still remain a dependent State. The real answer lies in a distinction mentioned at an earlier stage: that between equality of status and of function.[41] As in the days of the border marches of England and of the Eastern marches of the Holy Roman Empire, a different regime must apply in the garrison States on the fringes of the Western World from that which may be compatible with Western security in the centres of the Atlantic world.

The safety and freedom of action of the armed forces of a community is of necessity the paramount consideration in any border region; for they are not the forces of an alien power, but the common defence forces of a community on whom nobody depends more directly and immediately than the inhabitants of these frontier lands.

Among equals, the danger of aggression from the East is the only possible justification for the rights of intervention and the special privileges which the Three Powers have reserved to themselves and their forces in Western Germany. This is made abundantly clear in the General Treaty. It is there repeatedly emphasised that occupation is a matter of the past, and that the functions of the forces of these Powers stationed in the Federal Republic have changed from those of occupation forces to those of common defence forces and are determined by the 'special international situation in Germany'.[42] This point is formulated with still greater sharpness in Article 4 of the General Treaty: 'The mission of the armed forces stationed by the Three Powers in the Federal territory will be the defence of the free world, of which the Federal Republic and Berlin form part'.[43]

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[40] Series A, No. 1. See further *loc. cit.* in note 17 above, 1949, pp. 58–59.

[41] See above, p. 300. Cf., however, J. L. Kunz, *The Contractual Agreement with the Federal Republic* (47 *A.J.I.L.* 1953, p. 112).

[42] Para. 5 of the Preamble of the General Treaty.

[43] The keen 'linguist' who altered the future tense in Art. 1 of the German text (see above, p. 305) either was not interested in this Article or thought it wise to concentrate on essentials. In any case, he left the German version of this Article unemended.

(c) *Safeguards in relation to the Soviet Union.* To all the clauses purporting to maintain the tottering façade of Four-Power co-operation regarding Germany, the passage in one of the letters of the Allied High Commissioners for Germany to the Federal Chancellor applies—that certain reservations made will be 'formally' maintained.[44] To give one example, in Article 2 of the General Treaty, the Three Powers reserve to themselves not only the rights exercised hitherto relating to the stationing of armed forces in Germany, but also relating to Berlin and Germany as a whole, including the unification of Germany and a peace settlement. In substance, however, a good many of these reserved rights will only be exercised in the closest consultation with the Federal Republic.[45] It is one of the purposes of the diplomatic correspondence forming part of the Treaties to relieve the texts of some of the more glaring instances of apparent contradiction in intentions and policies. Another is to reassure both the Three Powers and the Federal Republic that neither side will ever double-cross the other[46] in these tantalising triangular relations between former comrades in arms turned arch enemies, and totalitarian aggressors of bygone days converted into stout defenders of Western civilisation.

(d) *Junctim Clauses.* The General Treaty and the related conventions are only part of the overall settlement. The Treaty on the European Defence Community is to be the complement. The difficulty has been how best to join the two parts; for the Anglo-Saxon Powers remain outside this more localised and more highly integrated community. This has been done by way of special provisions, known as the *junctim* clauses. Thus, in the first place, the Federal Republic has bound herself in the General Treaty to participate in the European Defence Community.[47] The decisive clause, however, is Article 11 of the General Treaty. The General Treaty will come into force only if two conditions are fulfilled. It must be ratified together with all the related subsidiary conventions by all signatory States, and the Treaty on the European Defence Community must have entered into force. Only then will the Federal Republic cease to be subject to the Occupation Statute.

[44] Cmd. 8571 (1952), p. 141.

[45] See *ibid.*, p. 141 *et seq.*

[46] Cf., for instance, Paras. 3 and 4 of Art. 7 of the General Treaty.

[47] Art. 4 (4).

(2) *Effective Provision for European Defence.* The German demand for equality had to be squared with the French refusal to consent to the recreation of a new German army. The transformation of all the national armies concerned into an international force provided a constructive synthesis. So long as the principle of equality was safeguarded, the Federal Government was prepared to go to any length in this direction. This put the final responsibility on French statesmanship, and it rose to the occasion.

Loose and informal understandings work among nations when they have a great deal in common, share a high ethical denominator and trust each other. Whether or not the first two qualifications apply in the relation between Continental States, the third certainly does not. Thus, international co-operation in this vital field was destined to be either mere camouflage for the resumption of an outlived Franco-German rivalry or it had to be on a higher level of integration than is attainable within the confederate pattern. Fear of the potentialities of an American-sponsored Federal Republic with a national army of her own and awareness of the tragic weakness of present-day France were enough to make M. Schuman snatch at the idea of a European army.

(a) *The General Framework.* The Pleven Plan and the European Coal and Steel Community provided commensurate models. In the end, an international institution with a legal personality of its own[48] and far-reaching competences, closely shaped on the pattern of the European Coal and Steel Community,[49] emerged.

The Commissariat of the European Defence Community corresponds to the High Authority of the Coal and Steel Community, but with stronger emphasis on its executive functions. The Assembly and Council fulfil similar functions in both organisations. As already mentioned, the European Defence Community makes use of the Court of the Coal and Steel Community.[50]

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[48] Interesting problems arise from the international personality of the European Defence Community regarding its rights and duties under the laws of warfare (see further Arts. 80–82 of the E.D. Treaty and the Protocol on this matter, *loc. cit.* in note 10 above, p. 328) and regarding the status of the Defence Forces in the territories of the members (cf. the Convention on the Legal Status of the E.D. Forces, *ibid.*, p. 305 et *seq.*).

[49] Cf. Green, *loc. cit.* in note 30 above, p. 274 *et seq.*

[50] Cf. above, p. 307.

Common organs, a common defence budget, common armaments programmes and common forces are the salient features of this remarkable new international institution.

(b) *Basic Units.* Once the principle of a common force was accepted, a decision had to be taken on the maximum size of national units still permitted within the European forces. In the case of the land forces this was fixed at a group of divisional strength (about 15,000 men) and in that of the air force at twelve squadrons of all types of aircraft.[51] On the ground of greater technical efficiency of such relatively large units, protracted French opposition was finally overcome under American pressure. In the case of the naval forces, the highest basic unit of nationally homogeneous units has still to be determined.

(c) *Casus Foederis.* The 132 articles of the main treaty and the additional protocols and conventions raise a bewildering number of organisational questions. Yet, assuming all of these to have been adequately dealt with, in the end the one pre-eminent issue is: Who decides on the use of this force? In the traditional terminology, who decides on the *casus foederis*? The answer is casually provided in Article 123 (in the last section) of this lengthy document. The responsibility rests with the Council, and the decision has to be taken unanimously. Thus, if action should be required, the European Defence Community corresponds to the federal pattern on all levels but that which is decisive.[52] As in defensive alliances of a more traditional type, every member of the Defence Community reserves to itself the decision on the *casus foederis*.

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[51] Arts. 1–3 of the Additional Protocol to the E.D. Treaty (*loc. cit.* in note 10 above, p. 243 *et seq.*).

For an estimate of the likely number of such groups, see J. Trempent, *Le Traité Instituant la Communauté Européenne de Defénse* (*International and Comparative Law Quarterly*, 1952, p. 522) and, on the real guarantees against any break-away—the integrated supply services—Mr. Eden in the House of Commons, August 1, 1952 (*Hansard*, Vol. 504, col. 1950).

[52] In contrast to the traditional presumption in favour of national sovereignty, Para. 1 of Art. 3 of the E.D. Treaty is a remarkable reversion in the order of priorities: *'La Communauté veille à ce que les intérêts propres des États membres soient pris en considération dans toute la mésure compatible avec ses intérêts essentiels'*.

Comparative lawyers will be interested in the possibilities of a unification of Continental penal law as a result of the criminal jurisdiction to be exercised by the E.D.C. over members of the European Defence Forces (cf. *Protocole Juridictionel*, especially Arts. 18–19, and *Protocole relatif au Droit Pénal Militaire* (*loc. cit.* in note 10 above, pp. 266 and 273).

This, however, is only one aspect of the veto in such a partial federation. Another, and more novel feature, which deserves to be stressed, is that, without the concurrence of the other members of the community, no member has any longer the power to commit to action its own contingents in the common defence force. With exceptions resulting from responsibilities of members outside Europe or from the Second World War,[53] member States are no longer to have national armed forces of their own.

(d) *Relations with NATO.* The major incentive for the European Defence Community was to find an alternative to a national West German army. Once this was settled, the Federal Republic remained indefinitely excluded from NATO.[54] If this was to be so, the Federal Government pressed that the other members of the European Defence Community, too, should be represented in NATO only collectively through the appropriate organs of the Community.

It must suffice to state the outcome of the prolonged discussions on this point. The Federal Government gained its point in substance though not in form. Co-ordination between both organisations on the political levels was achieved by a series of protocols.[55] They establish practically complete reciprocity of rights and duties between the members of NATO and of the Defence Community regarding the *casus foederis,* and in terms of the obligations of the NATO members among each other. On the purely technical side, ample provision is made for the NATO High Command to exercise sufficient supervision over the European Defence Forces in time of peace[56] and to take over complete control in time of war.[57]

(e) *Relations with the United Kingdom.* As in the case of the European Coal and Steel Community, so in that of the European Defence Community, the United Kingdom preferred close association to outright membership.

The form chosen was a special treaty, providing on a basis of reciprocity for automatic military assistance by the United

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[53] Arts. 9–10 of the E.D. Treaty. Cf. also Art. 11.

[54] See above, p. 303.

[55] *Loc. cit.* in note 10 above, pp. 290 *et seq.* and 332 *et seq.*

[56] Cf. especially Para. 1 of Art. 18 of the E.D.T. and the Protocol on the Relations between NATO and the E.D. Community.

[57] Cf. *ibid.,* Para. 2.

Kingdom in case of attack against any member of the Defence Community or against the European Defence Forces.[58] Ironically enough, this treaty was modelled on Article IV of the Brussels Treaty of 1948[59] which, in its Preamble, gave expression to the resolve of the Contracting Parties to 'take such steps as may be held to be necessary in the event of a renewal by Germany of a policy of aggression'.

If long hereafter—then probably in response to Professor Campbell's generous suggestion[60]—a perplexed reader should still care to glance at the by then presumably dusty volume of *Current Legal Problems, 1953,* he might well wonder what, at the time, was the constructive alternative envisaged by the opponents to these treaties; for the efforts made in Bonn and Paris come as near as any to squaring a number of the proverbial circles.

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[58] Text *loc. cit.* in note 10 above, p. 296. Cf. also Cmd. 8512 (1952) and the informative survey by H. J. Heiser on *Grossbritannien und die europaeische Integration* (7 *Europa-Archiv,* 1952, p. 5073 *et seq.*).

[59] Cmd. 7599 (1949).

[60] 67 *Law Quarterly Review* (1951), p. 258.

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